Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1997

LECHUZA VILLAS WEST,
a California limited partnership,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, STATE OF CALIFORNIA, STATE LANDS COMMISSION, and MALIBU-ENCINAL HOME OWNERS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Lechuza Villas West (Lechuza) applied four times to respondent California Coastal Commission (Coastal Commission) for permits to build single-family homes on beachfront lots in Malibu. The Coastal Commission formally and unequivocally denied all of Lechuza's permit applications on grounds indicating that it would allow no development whatsoever on Lechuza's lots. In a subsequent regulatory takings action in state court, Lechuza alleged that the Coastal Commission's actions denied it all economically viable use of its land. The agency defended its actions by arguing that there were pre-existing limitations upon Lechuza's title and other background principles of state property and nuisance law that rendered the lots unbuildable. The trial court rejected these arguments and found that the Coastal Commission had unjustifiably deprived Lechuza's property of all economically viable use. Without disapproving these findings, the California Court of Appeal nonetheless refused to find even a temporary taking, concluding that Lechuza's takings claim was not ripe because Lechuza had not, *prior to* bringing its takings claim, negated the Coastal Commission's defenses in a separate judicial proceeding. The question presented is

Whether the property owner has satisfied the *Williamson County* "final decision" requirement for ripening a regulatory takings claim when the owner has obtained a conclusive determination from the regulatory agency that no economically viable use of the subject property will be allowed, or must the property owner additionally commence and conclude separate litigation to negate every single one of the agency's affirmative defenses *before* bringing a takings claim.

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PETITION FOR A WRIT OF CERTIORARI

Lechuza Villas West (Lechuza) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District.

OPINIONS BELOW

The order of the Supreme Court of California denying Lechuza's petition for discretionary review is unreported; it appears at Appendix A to the petition. The opinion of the California Court of Appeal is partially reported as *Lechuza Villas West v. California Coastal Commission*, 60 Cal. App. 4th 218, 70 Cal. Rptr. 2d 399 (1997); the entire opinion is reproduced at Appendix B to the petition. The relevant orders and opinions of the trial court are unreported; they appear at Appendices C, D, and E to the petition. The order of respondent California Coastal Commission denying Lechuza's final permit application is unreported; it appears at Appendix F to the petition.

JURISDICTION

The opinion and judgment of the California Court of Appeal were entered on December 19, 1997; the opinion was modified in an order denying rehearing dated January 14, 1998. Petition Appendix (Pet. App.) B-1. Lechuza's timely petition for discretionary review to the California Supreme Court was denied on April 1, 1998. Pet. App. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Facts and Administrative Proceedings

Lechuza is a California limited partnership that purchased 17 previously subdivided lots for about $2 million in 1990. These lots front on Lechuza Beach in what is now the City of Malibu; they form a small portion of the 170 lots that constitute Tract 10630, which is zoned for single-family residences and 80% developed with such residences. At all times, Lechuza's "intention with respect to the lots was to do what owners of the immediately adjacent parcels had already done: erect single-family residences." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1008 (1992). These proposed residences were of the same general size, type, and distance from the ocean as beachfront homes located on either side of Lechuza's property. Indeed, at least three beachfront homes similar to those proposed by Lechuza were approved and built *after* Lechuza acquired its lots—one as late as March of 1993, *after* the denial of Lechuza's final permit applications, as set forth below. *See* Pet. App. F-8, F-47 to -48; 9 Joint Appendix in the California Court of Appeal (J.A.) 2323-24; 10 J.A. 2363.

As coastal property, Lechuza's lots are subject to the jurisdiction of the Coastal Commission. Accordingly, in October of 1990, after having obtained the requisite approvals in concept from various agencies of Los Angeles County, Lechuza applied to the Coastal Commission for the development permits necessary to build single-family homes on its lots. As part of its permit applications, Lechuza submitted the "determination" letters it had obtained from respondent State Lands Commission (Lands Commission), the state agency charged with administering the publicly owned tidelands located immediately seaward of Lechuza's lots. These determination letters (one for each lot) acknowledged that no portion of Lechuza's proposed residences was located on property known to be in public ownership. *See* 10 J.A. 2405-34.

The Coastal Commission denied Lechuza's first set of permit applications in January of 1991. The stated justification for the denial—the project's "inconsistency with the shoreline protection, hazards, access and recreation and visual policies of the Coastal Act," 10 J.A. 2436—shared much in common with "the 'uncontested . . . findings' of the South Carolina Legislature that new construction in the coastal zone . . . threatened [a] public resource" in *Lucas*, 505 U.S. at 1010 (first alteration in original). The Coastal Commission denied Lechuza's second and third sets of applications, which proposed successively smaller projects, in April and December of 1991, respectively. These subsequent denials rested on the same "recitation of a noxious-use justification" as the agency's first denial. *Id.* at 1026.[1] Lechuza challenged all of these denials in a consolidated action in Los Angeles County Superior Court. While the action was pending, this Court issued its decision in *Lucas*, which held (among other things) that a governmental body's "recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* By stipulation, Lechuza's permit applications were remanded to the Coastal Commission for reconsideration in light of *Lucas*, without prejudice to Lechuza's future claim for a temporary taking "commencing on the date the underlying applications were first denied." 11 J.A. 2753.

Back before the Coastal Commission, Lechuza submitted yet another set of permit applications. Nearly four months after

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[1] *See, e.g.*, 10 J.A. 2464 (summary of staff recommendation regarding second set of applications); 10 J.A. 3501 (same regarding third set of applications). As explained by the California Supreme Court in a case discussed in Section I.C below, the Coastal Commission's regulations provide that "a vote by the Commission that is consistent with [the] staff recommendation and not otherwise modified, . . . shall be deemed to adopt the findings and conclusions recommended by the staff." *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1192 n.3 (Cal. 1998) (alterations in original) (quoting Cal. Code Regs. tit. 14, § 13092(d)).

such submission, and on the eve of the hearing scheduled to consider the applications, the Lands Commission joined the fray. As a result of repeated, nonpublic urgings by the staff of the Coastal Commission, *see, e.g.*, 10 J.A. 2535-36, the Lands Commission revoked the determination letters it had issued to Lechuza. For the first time, the Lands Commission publicly asserted that "the State's sovereign ownership *has extended* to land on which portions of [Lechuza's proposed] project would be located," meaning that "construction of residential facilities would not be permitted on [such] lands." 10 J.A. 2530, 2531 (emphasis added). The Lands Commission further asserted, again for the first time, that Lechuza's lots were burdened with a public navigational and recreational easement over any "area subject to wave uprush" and that Lechuza's project would interfere with such easement. 10 J.A. 2531.[2] Seizing on these

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[2] Briefly, with respect to the ownership issue, the State asserted that on some seven occasions during a 45-year period from 1946 through 1988, the mean high tide line (which marked the shifting boundary between public tidelands and private uplands) had temporarily moved landward of the footprint of Lechuza's project. *See* Pet. App. F-18. These movements caused the project to run afoul of the State's legal theory that upland property owners "may not develop or erect improvements below [i.e., seaward of] the most landward [observed] location of the mean high tide line." 4 J.A. 777.

With respect to the easement issue, the State's legal theory was even more aggressive. According to the State, regardless of the ownership of the underlying land, any "area of wet sand on the beach," Opening Brief of Appellant State of California in California Court of Appeal at 46, was burdened with an easement allowing members of the public to use the beach "for boating, swimming, wading, fishing and other recreational uses," 4 J.A. 778. Furthermore, beachfront property owners "may not develop or erect improvements below the most landward [known] location of [this] public easement." *Id.* This theory was fatal to Lechuza's project—and, indeed, to *any* development of Lechuza's property—because in the State's view the *entire property* was below the most landward location of the recreational

(continued...)

novel assertions, the Coastal Commission in January of 1993 once again denied Lechuza's permit applications. Along with its familiar litany of environmental objections, the agency for the first time asserted that Lechuza had "failed to demonstrate that [it] has sufficient ownership interest in the property" and in addition that Lechuza's project "would obstruct the public in its continued use of [its navigational and recreational] easement" and would therefore "constitute a public nuisance." Pet. App. F-19, F-20. In April of 1993, the Commission denied Lechuza's petition for rehearing. *See* 9 J.A. 2327.

B. The Proceedings in the Trial Court

In response to this fourth and final denial of its permit applications, Lechuza returned to state court and resumed its still pending action against the Coastal Commission. Lechuza again sought to overturn the agency's denials of the permit applications and to establish the agency's liability for a temporary and permanent taking of Lechuza's property. In the ensuing three years, the other respondents entered the case as parties adverse to Lechuza, and various issues were litigated. As relevant to the question presented, however, the trial court made the following key rulings: First, "the issue of a temporary taking is ripe and properly before this Court." Pet. App. D-2. Second, Lechuza "has been temporarily deprived of all economically viable use of the property." *Id.* Third, all of the Coastal Commission's environmental justifications for the deprivation "have been rejected by *Lucas*." Pet. App. D-3. Fourth, Lechuza "has carried its burden of proving ownership of the subject property to the seaward boundary as established by this Court" and "the subject property is not burdened with a public navigational servitude landward of the location of the seaward boundary." Pet. App. E-6. As part of this latter ruling, the trial court held that

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[2] (...continued)
easement, the property at times having been completely inundated by ocean water. *See* 10 J.A. 2405-34 (determination letters issued by Lands Commission).

"on beaches [such as Lechuza Beach] subject to a fluctuating mean high tide line due to annual erosion and accretion," the boundary between private uplands and public tidelands was a fixed line, determined by calculating "the average location of the surveyed mean high tide lines on the subject property." Pet. App. E-3 (capitalization altered).[3]

In light of these findings, the trial court granted Lechuza's motion for summary judgment as to the Coastal Commission's liability for a temporary taking of its property, deferring calculation of Lechuza's damages to a later trial (which never took place). *See* Pet. App. D-3. Finally, the court entered a partial judgment remanding the matter to the Coastal Commission in order for the agency to reconsider (yet again) Lechuza's permit applications in light of the court's rulings. *See* Pet. App. C-2. That remand was "without prejudice to [Lechuza's] claim to damages for a taking of property without just compensation commencing on the date that the Commission first denied applications for the use of the subject property." *Id.*

C. The Decision of the Court of Appeal

Rather than comply with the trial court's remand order, the Coastal Commission and the other state respondents with it (collectively, the State) filed "petitions for extraordinary relief" to bring the case before the California Court of Appeal, Second Appellate District. Pet. App. B-15. Judging that "[f]urther proceedings in the trial court would be unlikely to improve upon the record or briefing" and observing "the continuing public

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[3] Lechuza's lots are encumbered by an express easement in favor of the homeowners in Tract 10630, represented in this litigation by respondent Malibu-Encinal Home Owners Association, Inc. (MEHOA). As part of the boundary ruling described in the text, the trial court also "determine[d] that MEHOA's express easement [over Lechuza's lots] is measured 25 feet landward from the southerly boundary of the subject property." Pet. App. E-6 to -7. The trial court then entered a final judgment resolving all claims between Lechuza and MEHOA. *See* 8 J.A. 1929-32.

interest in the present issue and its likely recurrence," the court of appeal set about "resolving the issues raised by this case." Pet. App. B-15.

As to the dispute between Lechuza and the State, the court below made essentially three rulings. First, the court held that "Lechuza's property is not subject to any public navigational or recreational rights landward of the ordinary high tide line as it may exist from time to time." Pet. App. B-37. Like the trial court, the appellate court thus rejected the State's assertion that "the public has a navigational easement over any area covered by waters of the Pacific Ocean." Pet. App. F-20. In so ruling, the court necessarily *rejected* one of the State's principal justifications for refusing to permit any construction on Lechuza's lots—that such construction would "obstruct the public in its continued use of [the navigational and recreational] easement" and would thus "constitute a public nuisance." *Id.* This rejection was hardly surprising: until the State needed a justification to kill Lechuza's project, the notion that the public has a right to make recreational use of all private beachfront property covered by wet sand was simply without precedent in California law.

On the other hand, the court below accepted the State's argument that "the proper boundary between the State's tidelands and Lechuza's private property is a line which moves as the ordinary high tide (a fixed plane) intersects the shifting sands from day to day." Pet. App. B-21. That is, on Lechuza Beach and other beaches in California subject to fluctuating mean high tide lines, "the legal boundary line is ambulatory, not fixed." *Id.* (capitalization altered). The court did not discuss whether the "ambulatory" nature of this boundary line was sufficient, as a matter of state property law, to justify the State's claim that Lechuza may not develop or erect improvements below the most landward observed location of the mean high tide line—even if those improvements would be located on indisputably private property at the time they were erected. *See*

note 2, *supra*. Nor did the court discuss whether state property law, if construed to uphold the State's claim, would effect "a retroactive transformation of private into public property," as Justice Stewart described it in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (concurring opinion).[4]

In fact, the court did not discuss *any* issue regarding how the State's limited victory on the boundary issue might affect the existence or the amount of State's liability for a temporary taking. This lack of discussion, although perhaps surprising, stemmed directly from the court's third ruling, which is the sole basis of the present petition: Lechuza's takings claim was not ripe. Reasoning that "there can be no *taking*, temporary or permanent, until there is a final governmental determination which deprives a property owner of all or substantially all economic use of his or her property," the court held that "[t]here has been no such final determination here." Pet. App. B-21.

Thus, notwithstanding the Coastal Commission's unequivocal rejection of Lechuza's fourth and final application for a development permit—"[t]he Commission hereby *denies* a permit for the proposed development," Pet. App. F-6 (emphasis in original)—the court below found Lechuza's takings claim to be unripe on the following ground:

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[4] At trial, Lechuza presented evidence that neither the Coastal Commission nor any other agency had raised this claim in connection with any application for development along Lechuza Beach—or, for that matter, any private sandy beach in California—save for Lechuza's application. *See, e.g.*, 9 J.A. 2317-20; 10 J.A. 2363. Furthermore, in the one reported instance where the State had sought to enforce its claim that coastal property owners may not build improvements below the most landward observed location of the mean high tide line, the California courts decisively rejected that claim. *See People v. William Kent Estate Co.*, 51 Cal. Rptr. 215 (1966) (reversing an injunction obtained by the State that prohibited the private property owner from erecting a fence on land that was occasionally located seaward of a fluctuating mean high tide line).

> In *Lucas*, the Supreme Court held that a regulation which denied a coastal owner the right to any construction on or other beneficial use of his property would constitute a compensable taking if, under state law, a right to develop the land existed prior to enactment of the challenged regulation. Here, Lechuza did not establish that it had such a right to develop "its" property as requested in its permit applications, given that it had not established the location of the [property's] legal boundary and of MEHOA's express easement [prior to the permit denial].

Pet. App. B-21. In other words, "until the judicial decision as to the legal boundary became final," and until Lechuza thereafter "resubmit[ted] permit applications based on the legally established boundary," Lechuza's takings claim was premature. Pet. App. B-20 to -21.

Based on this ruling, the appellate court ordered the trial court to "vacate [its] order granting summary adjudication in favor of Lechuza on the issue of takings liability." Pet. App. B-41. Lechuza filed a timely petition for discretionary review to the California Supreme Court, which was denied on April 1, 1998. Pet. App. A-1.

REASONS FOR GRANTING THE PETITION

The petition should be granted because the court below decided an important question of takings procedure in a way that conflicts with this Court's decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *First English Evangelical Lutheran Church v. County of Los Angeles, California*, 482 U.S. 304 (1987). The petition should also be granted because the decision below, read in conjunction with the California Supreme Court's recent ruling in *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998), conflicts with decisions of other state courts and lower federal courts.

I

THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF TAKINGS PROCEDURE IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *WILLIAMSON COUNTY* AND *FIRST ENGLISH*

To place the ruling below in perspective, it is necessary briefly to review the procedural framework for litigating regulatory takings claims constructed by this Court in *Williamson County*, *First English*, and *Lucas*. The first of these decisions established that a property owner who wishes to assert a federal takings claim in state court must obtain from the relevant administrative agency "a final decision regarding how [the owner] will be allowed to develop its property." 473 U.S. at 190. If the owner proves in the ensuing litigation that this final decision "deprives [the owner's] land of all economically beneficial use," the owner is presumptively entitled to the benefit of the Court's "categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026, 1027. At that point, the government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the owner's] title to begin with." *Id.* at 1027. That is, to succeed in resisting compensation for land-use limitations that deny all economically viable use of property, the government must affirmatively show that the limitations "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

If the government cannot make this showing, however, "compensation must be paid" to the owner. *Id.* at 1030. At this stage of the proceedings, the government "may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation." *Id.* at 1030 n.17 (citing *First English*, 482 U.S. at 321). But even if it rescinds the decision that deprived the property of all economically viable use, the

government cannot avoid monetary liability altogether. *Lucas* reiterated the teaching of *First English* that "where the [government's activities have] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* (quoting same).

How does the decision below fit into this procedural framework? In 1991—seven years ago—the Coastal Commission made its "final decision regarding how [Lechuza] will be allowed to develop its property." *Williamson County*, 473 U.S. at 190. In denying Lechuza's first three sets of applications for permission to build homes on its lots, the Coastal Commission made abundantly clear that no residential use of the property would ever be allowed.[5] The denial of Lechuza's *fourth* set of

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[5] As revealed by the Coastal Commission's findings with respect to each of Lechuza's four sets of permit applications, *any* residential structure on Lechuza's lots would have run afoul of at least three separate policies enforced by the agency: (1) that a shoreline protective device necessary to build a house "would be approved only if the device served coastal-dependent uses, protected existing structures, or *protected new structures which were infill development*," Pet. App. F-47 (emphasis in original), categories for which Lechuza's project assuredly did not qualify, *see* Pet. App. F-42 to -49; *accord* 10 J.A. 2445-47, 2473-76, 2504-07; (2) that any new homes "located on undeveloped sandy beach" like the relevant section of Lechuza Beach "are not compatible with the surrounding character of the area and will therefore result in a significant visual impact" that is "not consistent with . . . the Coastal Act," Pet. App. F-62 to -63; *accord* 10 J.A. 2451, 2480, 2515; and (3) that approval of any project on Lechuza Beach "at this time would prejudice the preparation of" the recently incorporated City of Malibu's "local coastal program," Pet. App. F-82; *accord* 10 J.A. 2454, 2484, 2521. *See also* note 2, *supra* (describing how any development of Lechuza's property would have conflicted with the navigational easement asserted by the State).

Finally, there are the Coastal Commission's own words as to why it would permit no development on Lechuza's lots: "From time to

(continued...)

permit applications on January 14, 1993, only confirmed that point, and the trial court so found. In the ensuing litigation, Lechuza proved that, by virtue of the Coastal Commission's actions, it "ha[d] been temporarily deprived of all economically viable [or productive] use of its property." Pet. App. D-2. At that point, it was the State's burden, if it wished to avoid having to pay compensation, to show that "a pre-existing limitation upon [Lechuza's] title" or other "background principles of the State's law of property and nuisance" supported the Coastal Commission's confiscatory actions. *Lucas*, 505 U.S. at 1028-29. The State attempted to meet this burden by asserting that Lechuza's title was limited by the State's ownership interest in portions of the lots and by public and private easements that rendered the proposed project a public nuisance; however, the trial court rejected all of these assertions. Consistent with *First English*, the trial court then found the State liable, in an amount to be determined at a later trial, for a temporary taking of Lechuza's property. *See generally* pages 5-6, *supra*.

In vacating the judgment holding the State liable for a temporary taking, the appellate court did not disturb any of the trial court's findings on the takings issue.[6] Rather, the court

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[5] (...continued)
time, the Commission sees cases where someone purchases property which cannot be developed consistent with reasonable requirements to protect the public's health, safety, and welfare." 10 J.A. 2492. No reasonable person could read the agency's denials, taken as a whole, to contain the suggestion that a smaller or different (while still economically viable) project would garner the agency's approval.

[6] Specifically, the appellate court did *not* dispute that the Coastal Commission had made a definitive decision regarding how Lechuza would be allowed to develop its property; that the effect of this decision was to deprive Lechuza of all economically viable or productive use of its property; or that the agency's decision was not justified by pre-existing limitations in Lechuza's title or other background principles of state property and nuisance law.

below ruled that Lechuza's takings claim failed for one reason only: that the Coastal Commission's decision was not "final" within the meaning of *Williamson County* (and therefore not ripe) because Lechuza had not "established"—in separate litigation concluded *before* it asserted its takings claim—that it had a right to develop its property under state law. Pet. App. B-20 to -21. In other words, Lechuza's claim was unripe because Lechuza had not, *prior to* bringing its takings action, judicially negated all of the State's attacks on its title and all of the State's other arguments based in property and nuisance law. It is crucial to grasp that the court below did *not* reject Lechuza's takings claim on the ground that Lechuza actually had no right to develop its property under state law.[7] Rather,

[7] With respect to the boundary and easement issues, the court ruled against Lechuza in two limited respects, namely, that the boundary between Lechuza's lots and the public tidelands is an "ambulatory line" rather than a fixed one, and consequently that "MEHOA's express easement cannot be defined in terms of a 25 foot measurement above the fixed line established by [the trial court]," Pet. App. B-33, B-39. The court's ruling on the boundary issue obviously did not finally resolve the State's request for "a declaration that [Lechuza] may not develop or erect improvements below [i.e., seaward of] the most landward known location of the mean high tide line" as that line moved from time to time. 4 J.A. 777. Accordingly, the appellate court did not enter judgment for the State; instead, it ordered the trial court to "conduct further proceedings not inconsistent with the views expressed herein." Pet. App. B-41; *cf.* Pet. App. B-42 n.20 (expressing agnosticism as to whether or not "a judicial determination of [the boundary] line's location as of any specific date or dates" would be "useful" in future dealings between Lechuza and the State).

As to MEHOA's express easement, the appellate court observed that the easement "clearly provides for an alternate northerly boundary depending on the interrelationship of [various lines]." Pet. App. B-39. Because "[t]his issue was not addressed in the judgment," the trial court was directed, "upon remand, [to] determine the two alternate northerly lines at which the northerly boundary of the express easement lies or may lie" and, more generally, to "conduct further

(continued...)

Lechuza's takings claim was rejected on the ground that, even if the trial court were entirely correct in ruling that none of the State's attacks on that right had merit, Lechuza's takings claim could not ripen until *after* the trial court's ruling became final on appeal.[8]

In more general terms, then, the court below established a rule of takings procedure that requires a property owner to commence and conclude separate litigation negating each of the government's takings defenses prior to bringing a regulatory takings action. In other words, property owners must obtain a final *judicial* decision before their takings claims become ripe. As explained below, that novel rule is inconsistent with both *Williamson County* and *First English*.

A. The Conflict with *Williamson County*

In *Williamson County*, this Court held that a regulatory takings claim "is not ripe until the government entity charged with implementing the [challenged] regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. As indicated by this passage and others like it in *Williamson County*, the requisite "final decision" is not the decision of a court, but rather the decision of the relevant administrative agency, namely, "the government entity charged with implementing the regulations." *Id.* Thus,

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[7] (...continued)
proceedings not inconsistent with the views expressed herein." Pet. App. B-39, B-40, B-41. In addition to the alternate boundary lines, those proceedings will have to address—also for the first time—the long-standing arguments of Lechuza that enforcement of MEHOA's easement is barred by waiver, laches, estoppel, and public policy.

[8] In this regard, it is useful to observe that the appellate court's disposition of Lechuza's takings claim on ripeness grounds came before, and without reference to, the court's resolution of the boundary and easement issues. *Compare* Pet. App. B-20 to -21 (takings issue) *with* Pet. App. B-21 to -39 (boundary and easement issues).

the Court explained that one cannot undertake a proper takings inquiry until "the *administrative agency* has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191 (emphasis added). Furthermore, the Court faulted the property owner in *Williamson County* for not obtaining "a conclusive determination by *the Commission* whether it would allow [the proposed development]." *Id.* at 193 (emphasis added).

The Court's subsequent ripeness decisions confirm that *Williamson County*'s "final decision" requirement referred to the final decision of an administrative agency, not a court. In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Court observed that the resolution of the question whether a land use regulation has gone "too far" depends, "in significant part, upon an analysis of the effect [of] *the Commission's* application of the zoning ordinance and subdivision regulations." *Id.* at 349 (emphasis added) (quoting *Williamson County*, 473 U.S. at 199-200). As in *Williamson County*, the landowner in *MacDonald* was faulted for failing to "receive *the Board's* 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" *Id.* at 351 (emphasis added) (quoting *Williamson County*, 473 U.S. at 191).

Last year in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), the Court reiterated that a regulatory takings plaintiff "must demonstrate that she has . . . received a [final decision] from '*the government entity charged with implementing the regulations*'" or, to put it another way, "a final and authoritative decision from *the agency*." *Id.* at 1665 (emphasis added) (quoting *Williamson County*, 473 U.S. at 186). In the same vein, the Court referred to "*Williamson County*'s requirement of a final *agency* position" and to "*agency* action of the sort demanded by *Williamson County*." *Id.* at 1666, 1667 (emphasis added). The Court also observed that "*Williamson County*'s demand for finality . . . responds to the high degree of

discretion characteristically possessed by *land use boards* in softening the strictures of the general regulations they administer." *Id.* at 1667 (emphasis added).

If receiving a final decision from an administrative agency is *necessary* to ripen a regulatory takings claim, the unanimous Court in *Suitum* made clear that a final administrative decision is also *sufficient* to ripen such a claim brought in state court.[9] Thus, the Court considered "a final and authoritative decision from the agency" to be "sufficient to satisfy the first prong of *Williamson County*." *Id.* at 1665. With respect to the facts before it, the *Suitum* Court observed: "It is undisputed that *the agency* has finally determined that [the property owner's] land lies entirely within [a no-development zone] and that it may therefore permit no additional land coverage or other permanent land disturbance on the parcel." *Id.* at 1667 (emphasis added) (internal quotation marks and citations omitted). Given this final determination by *the agency*, this Court concluded that "[t]he demand for finality is satisfied . . . , there being no question here about how the 'regulations at issue [apply] to the particular land in question.'" *Id.* (quoting *Williamson County*, 473 U.S. at 191) (final alteration in original).

In addition to the foregoing, *Williamson County*'s discussion of "exhaustion" requirements confirms that a regulatory takings claim is ripe as soon as the *administrative* agency has arrived at a final decision and that a *judicial* decision is not a prerequisite to asserting a takings claim. In setting forth the finality requirement, *Williamson County* rejected the argument that such requirement was inconsistent with *Patsy v. Florida*

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[9] Under current doctrine, a plaintiff who wishes to pursue a regulatory takings claim in *federal* court must satisfy an additional ripeness requirement: in addition to finality, he must demonstrate that he has "sought 'compensation through the procedures the State has provided for doing so.'" *Id.* at 1665 (quoting *Williamson County*, 473 U.S. at 194). Obviously, this "state procedures" prong of *Williamson County* does not apply to takings claims brought in state courts, as here.

Board of Regents, 457 U.S. 496 (1982), which established that an aggrieved person need not "exhaust administrative remedies before bringing a § 1983 action." 473 U.S. at 192. The Court carefully explained why finality and exhaustion are "conceptually distinct":

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and *judicial procedures* by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id. at 192, 193 (emphasis added).

The Court went on to illustrate the difference between the two concepts by "comparing the procedures for seeking a variance [from the Planning Commission] with the procedures that, under *Patsy*, [the owner] would not be required to exhaust." *Id.* at 193. Observing that "the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities," the Court nevertheless explicitly held that the property owner "would *not* be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial." *Id.* (emphasis added). Yet under the decision below, Lechuza *was* required to resort to precisely these "judicial procedures"—namely, a declaratory judgment to "establish[] the legal boundary of the property" and, more generally, to "establish that it had [a] right to develop 'its' property"—in order to ripen its regulatory takings claim. Pet. App. B-20, B-21. This novel procedural requirement imposed by the decision below simply cannot be reconciled with *Williamson County* and its progeny.

B. The Conflict with *First English*

Although couched in terms of "finality," the ruling below also implicates another aspect of this Court's jurisprudence of regulatory takings procedure, namely, temporary takings. In *First English*, the lower court had held that "a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-07. This Court explicitly "disagree[d]" with that holding, concluding that the Takings Clause "would require compensation for that period." *Id.* at 307. The Court went on to hold that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321. The Court emphasized that mere invalidation of the government's action "without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." *Id.* at 322.

The ruling in the present case of the California Court of Appeal, Second Appellate District—which, surprisingly or not, is the *very same* court that was reversed in *First English*—cannot be reconciled with that decision. The court below said that a regulatory takings claim cannot ripen before a property owner has obtained a final judicial decision negating all of the government's takings defenses. This is the functional equivalent to saying (as the very same court said in *First English*) that a property owner may not recover damages for the time before it is finally determined that a governmental action constitutes a taking of his property—a proposition this Court emphatically rejected.

The present case perfectly illustrates this point. The trial court determined that the Coastal Commission's action in prohibiting any development of Lechuza's lots denied Lechuza all economically viable use of its property beginning in 1991, "on

the date that the Commission first denied applications for the use of the subject property." Pet. App. C-2. The trial court also determined that this complete prohibition on development was not justified by any pre-existing limitations on Lechuza's title or any other background principles of state property or nuisance law. Yet despite these determinations (and without disagreeing with them), the appellate court dismissed Lechuza's takings claim, meaning that Lechuza will never recover compensation for all the time it has been forced to leave its property economically idle (now seven years and counting). By this ruling, the court below did in fact "relieve" the State of its "duty to provide compensation for the period during which the [denial of all economically viable use] was effective"—notwithstanding the dictate of *First English* that "no subsequent action by the government" (including action by the courts) could relieve the government of that constitutional duty. 482 U.S. at 321.

First English admonished that state courts may not merely declare "invalid" government action that has deprived property of all economically viable use. That declaration, in the absence of attendant payment of just compensation for the temporary taking, is a "constitutionally insufficient remedy." *Id.* at 322. Yet a mere judicial declaration—without any compensation—is essentially what the court below "awarded" Lechuza when it ruled that "Lechuza's proper remedy would have been to resubmit permit applications" to the Coastal Commission based on the outcome of the present judicial proceedings. Pet. App. B-20. *First English*, however, teaches that what the decision below called a "proper" remedy is actually a "constitutionally insufficient" one. For this reason, and for the additional reasons discussed above, the lower court's ruling stands in marked conflict with this Court's decision in *First English*.

C. The Significance of the Decision Below

If it were just another garden-variety decision by a state intermediate appellate court that ignored this Court's interpretations of the federal Constitution, then perhaps the decision

below would not warrant review on writ of certiorari. But the decision below is more than that—it is an effective repudiation of *First English*, a repudiation accomplished by the very court that was itself (supposedly) repudiated in *First English*. Thus, while the Court does not exercise certiorari jurisdiction merely to sift through the many errors of lower courts, on occasion the Court appropriately grants review in order to rule that a lower court's "refusal to apply [applicable] federal law"—namely, a decision of this Court interpreting the Constitution—"violates the Constitution's Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747, 1749 (1995) (unanimously reversing the refusal of the Ohio Supreme Court to apply this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988)). This case calls for such a ruling.

Moreover, because the decision of an intermediate appellate court in California binds trial courts throughout the entire state, the decision below is now the law for all of California, not merely in the Second Appellate District.[10] The significance of this is underscored by the fact that the California Supreme Court has mandatory appellate jurisdiction only in capital cases, *see* Cal. Const. art. VI, § 11(a), which in turn helps to explain why that court issued written opinions in just 51 civil cases last year.[11] No doubt these considerations (in conjunction with the

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[10] *See Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 940 (Cal. 1962) (holding that "[d]ecisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state"). In this regard, of course, the California judicial system differs from its federal counterpart. *See, e.g., Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (agreeing with the D.C. Circuit that "[b]inding precedent . . . for the district courts within a circuit [is set] only by the court of appeals for that circuit").

[11] This figure is based on an examination of the 93 reported opinions issued by the California Supreme Court during calendar year 1997.

California judiciary's apparent hostility to the mandates of the Just Compensation Clause) have contributed over the years to this Court's relative willingness to review the decisions of the California Court of Appeal, particularly in takings cases. In addition to *First English* itself, these cases include *Yee v. City of Escondido, California*, 503 U.S. 519 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); and *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). *See also Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994) (vacating the decision of the California Court of Appeal, Second Appellate District, and remanding the case for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

In theory, of course, the decision below could be overruled someday by the California Supreme Court. In practice, however, that possibility does not exist, given the state supreme court's own assault on *Williamson County* and *First English*, launched the same month as that court denied discretionary review in the present case. In its essentials, *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998), is extremely close to the present case. There, as here, the property owner (Landgate) applied to the Coastal Commission for a permit to build a house on a coastal lot. The permit application was unequivocally denied based on an asserted defect in Landgate's title, the Coastal Commission having "determined that Landgate's lot was not legal." *Id.* at 1203. Landgate sued the agency seeking to overturn the permit denial and seeking damages for a taking of its property. The lower courts rejected the Coastal Commission's determination that Landgate's lot was not legal and eventually awarded Landgate damages for a temporary taking for the period during which it was unable to build on its lot. *See id.* at 1192-93.

The California Supreme Court, however, reversed on the takings issue. Without denying that the Coastal Commission's

denial of Landgate's permit application was unequivocal or that such denial prevented Landgate from making any economically viable use of its property, the state supreme court (like the court below in the present case) found that Landgate's takings claim did not satisfy *Williamson County*'s "final decision" requirement. That is, there was "not a final decision denying development" because, as a matter of law, the Coastal Commission "could not be said to have reached a final and authoritative determination of the development on Landgate's lot until *after* the dispute about the legality of the lot had been [judicially] resolved." *Id.* at 1203 (emphasis added) (echoing *MacDonald*, 477 U.S. at 348); *accord id.* at 1202 ("Or to put it another way, the Commission's denial of development on [a lot] is not a final decision on that development until the dispute over whether [the lot] legally existed was resolved."). Thus, like the court in the present case, the California Supreme Court required property owners to obtain "a *judicial* determination of the validity of certain preconditions to development" before their regulatory takings claims can become ripe. *Id.* at 1203 (emphasis added). As explained in Section I.A above, that rule cannot be reconciled with *Williamson County*.

Like the decision below, *Landgate* also tramples upon *First English*. Emphasizing the supposed "narrowness" and "implied limitation[s]" of the holding in *First English*, the California Supreme Court ruled "the denial of development due to a determination, subsequently held [by a court] to be erroneous, that the development did not conform to the property's legal boundary is not a taking"—even if that denial temporarily denied all use of the property. 953 P.2d at 1195, 1202. Can this ruling possibly be reconciled with the proposition that "where the government's activities have already worked a taking of all use of property," the government has a constitutional "duty to provide compensation for the period during which the taking was effective"? *First English*, 482 U.S. at 321. To add insult to injury, *Landgate* went so far as to adopt the reasoning of the

dissent in *First English*.[12] Accordingly, just as the decision below constitutes a repudiation of *First English* by the court whose judgment was reversed in *First English*, the California Supreme Court's decision in *Landgate* constitutes a repudiation of *First English* by the court whose takings jurisprudence was overruled in *First English*. *See* 482 U.S. at 10 (accepting petitioner's invitation "to hold that the California Supreme Court erred in *Agins v. Tiburon*," 598 P.2d 25 (1979)).

This point is illustrated nicely by considering how *Lucas* would have fared had it been remanded to the California courts rather than to the courts of South Carolina. Having informed the state coastal agency that it could avoid having to pay compensation to David Lucas only if it "identif[ied] background principles of property and nuisance law that prohibit the uses" intended by Lucas, this Court sent the case back to state court for the appropriate inquiry. 505 U.S. at 1031. On remand, the South Carolina Supreme Court concluded that the state coastal agency had not shown that "any common law basis exists by which it could restrain Lucas's desired use of his land." *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C.

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[12] *Compare Landgate*, 953 P.2d at 1203 (concluding that "a judicial determination of the validity of certain preconditions to development is a *normal* [and therefore noncompensable] part of the development process" (emphasis added)) with *First English*, 482 U.S. at 334-35 (Stevens, J., dissenting) (arguing that "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan"). The majority of the Court in *First English* disagreed, of course, expressly *distinguishing* judicial determinations and litigation from "*normal* delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 321 (emphasis added).

The identity between the *Landgate* majority and the *First English* dissent did not escape the attention of the dissenting justices in the *Landgate* case. *See* 953 P.2d at 1205-06 (Chin, J., dissenting); *id.* at 1209-10 (Brown, J., dissenting).

1992). Therefore, consistent with *First English*, the court held that "Lucas has suffered a temporary taking deserving of compensation commencing with the enactment of the 1988 Act and continuing through the date of this Order." *Id.* Contrast this treatment with the treatment that Lucas would have received in the California courts. Once they concluded that no basis existed by which the Coastal Commission could restrain Lucas's desired use of his land, the courts of California would have said essentially: "Sorry, Mr. Lucas, you get no compensation. Now that you've overcome the agency's defenses, your 'remedy' is to return to the agency and renew your request to use your land. You get nothing for the five years your property was forced to remain economically idle."

If the decision below is permitted to stand, then a government agency in California may deprive property of all economically viable use with impunity, having absolutely nothing to fear from the Just Compensation Clause as interpreted by the state courts. So long as the agency can muster any defense at all based on state property or nuisance law (even if completely meritless), the affected property owner will be forced to spend thousands of dollars (or even hundreds of thousands of dollars, as in the present case) and potentially many years (seven years and counting here) overcoming that defense in court. Yet even after prevailing against the agency, the owner would, under the decision below, receive *no compensation* for all the time during which the deprivation was in effect! Once the court rules in the owner's favor, the agency can simply rescind its original decision— without suffering any financial consequences for all the years it forced the property to remain economically idle. In addition to constituting a nullification of this Court's authority in the State of California, this state of affairs works a sea change in the law of takings procedure. To say the least, that change is inconsistent with this Court's decisions in *Williamson County* and *First English*. Therefore, a grant of certiorari is warranted under this Court's Rule 10(c).

II

THE DECISION BELOW, READ IN CONJUNCTION WITH THE CALIFORNIA SUPREME COURT'S DECISION IN *LANDGATE*, CONFLICTS WITH DECISIONS OF OTHER STATE COURTS AND LOWER FEDERAL COURTS

Although there is no explicit and acknowledged conflict on the question presented, this is because the lower court's ruling is (save for the *Landgate* decision) truly unprecedented. Nevertheless, the procedural framework for litigating regulatory takings claims established by the decision below and by *Landgate* stands in stark contrast to the framework employed by other courts to decide *Lucas*-type cases. Those courts treat the government's assertions of pre-existing limitations upon a property owner's title and other background principles of state property and nuisance law as "affirmative defenses" to a takings claim, not as separate issues that must be decided *before* a takings claim can even be asserted.

A. The Federal Circuit

In several cases, the courts of the Federal Circuit have adjudicated takings claims in a manner that is fundamentally inconsistent with the decision below. In *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc), the court considered a takings claim brought against the United States by the holders of property that had once been burdened with an easement, a railroad right-of-way. As recognized by the dissent, the viability of this claim "depend[ed] upon whether the right-of-way has been abandoned," because if it had *not* (and thus the easement still burdened the property), "the [plaintiffs] would have no present right to claim ownership of the underlying land" under state law. *Id.* at 1555 (Clevenger, J., dissenting). The case was therefore a perfect example of what *Lucas* had in mind in stating that the Court "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation on the landowner's title." 505 U.S. at 1029-30.

Had the case been litigated in the California courts under the decision below, the takings claim necessarily would have been dismissed as unripe, given that the plaintiffs "had not established"—in prior litigation—the precise contours of their ownership of the relevant property. Pet. App. B-21. But how in fact did the Federal Circuit treat the government's assertion of a pre-existing limitation on the plaintiffs' title? That court assuredly did *not* treat the assertion as a preliminary matter to be resolved *before* the takings claim could be brought; rather, the court treated it as one of "the Government's *defenses* based on the state's property law." *Preseault*, 100 F.3d at 1531 (plurality opinion) (emphasis added). Although the Federal Circuit was divided concerning the *merits* of the government's title-related defense, every single judge reached those merits and opined on the plaintiffs' ownership of the property as it bore on the viability of the takings claim. Not one judge even suggested that the takings claim could not ripen until *after* the plaintiffs' ownership "had been established" in *separate* litigation.[13]

Similar in this regard is *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). In that regulatory takings case, the government defended its denial of a permit to fill wetlands (a denial that deprived the plaintiff of all economically viable use of its property) on the ground (among others) that "allowing the fill would constitute a nuisance." *Id.* at 1182. Again, had the case been litigated in the courts of California

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[13] *See id.* at 1541-50 (plurality opinion) (examining, through the lens of Vermont law, the easement's original scope and subsequent abandonment); *id.* at 1553 (Rader, J., concurring) ("In the continuing evolution of this litigation, the court now correctly sets its sights on the question of abandonment, a point that both the opinion for the court and the dissent agree turns on issues of Vermont law."); *id.* at 1554 (agreeing with the plurality on the abandonment question); *id.* at 1556 (Clevenger, J., dissenting) ("In order to ascertain the nature of the [plaintiffs'] present property interest, we must examine state law, in this case, the law of Vermont, the site of the property in question."); *id.* at 1556-76 (conducting extensive examination).

under the decision below, the takings claim necessarily would have been dismissed as unripe, given that the plaintiff had not, in prior litigation, "establish[ed] that it had a . . . right to develop [its] property" by negating the government's claim that state nuisance law took away that right. Pet. App. B-21. The Federal Circuit, however, proceeded to adjudicate the takings claim, resolving the nuisance issue *in the takings litigation*. *See Loveladies Harbor*, 28 F.3d at 1183 ("The trial court concluded that the Government had failed to carry its burden of showing that [nuisance] law could have been invoked to prevent the fill. Our review of the record leads us to the same conclusion."). In contrast to the court under review, the Federal Circuit affirmed the trial court's judgment awarding compensation for a taking of the plaintiff's property.[14]

B. The Washington Supreme Court

In *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176 (1994), the Washington Supreme Court undertook a comprehensive review of takings law and procedure in light of this Court's then-recent decision in *Lucas*. The *Guimont* court held that, at the outset of a regulatory takings case, "the landowner must have the opportunity to prove . . . that the regulation either physically 'invades' his or her property or denies all economically viable use of the property." *Id.* at 10. If the landowner proves this, "the State will then have the opportunity to rebut this claim by identifying common law principles of state nuisance and property law that prohibit the

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[14] *See also Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 70 (1997) (treating the government's *Lucas*-based nuisance argument as a "defense" to be proved by the government as part of the present takings litigation, not a free-standing assertion that must be negated by the plaintiff in prior litigation); *cf. Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1577 n.10 (Fed. Cir. 1994) (Nies, C.J., dissenting) (observing without contradiction that *Lucas* "gives the government a *defense* based on nuisance limitations that inhere in the owner's title" (emphasis added)), *cert. denied*, 513 U.S. 1109 (1995).

uses the landowner now intends in the circumstances in which the property is presently found." *Id.* Thus, "[i]f the landowner proves a 'total taking' or 'physical invasion' has occurred, and if the State fails to rebut that claim, the owner is entitled to categorical treatment under *Lucas*," that is, payment of compensation. *Id.*; *accord Margola Associates v. City of Seattle*, 854 P.2d 23, 34 (Wash. 1993).[15]

Under this framework, a government's state-law defenses to a federal takings claim are adjudicated as part of the takings claim itself. Notably, the defenses need *not* be negated in separate, *prior* litigation in order to render the takings claim ripe for decision. Simply put, "if the State fails to rebut [a] claim" of denial of all economically viable use with a meritorious defense grounded in the background principles of state law, "the owner receives just compensation." *Id.* Contrast this framework established by the Washington courts with the framework established by the court below: if the state fails to advance a meritorious defense grounded in state property law, the owner receives no compensation, but merely the opportunity "to resubmit permit applications" based on the judicial decision that rejected the state's defense. Pet. App. B-20.

C. Other Federal and State Courts

Finally, the decision below and *Landgate* cannot be reconciled with numerous state and federal decisions that have faithfully applied *Williamson County* and *First English*. In contrast to the notion of the California courts that a takings claim cannot ripen until there has been a final *judicial* decision

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[15] The courts of Washington have continued to adhere to this framework. *See, e.g., Manufactured Housing Communities of Washington v. State*, 951 P.2d 1142, 1148 (Wash. App. 1998) ("An owner of property subject to a regulation that constitutes a physical invasion or a total [regulatory] taking is entitled to relief regardless of the public interest reasons supporting the regulation unless the State provides rebuttal evidence showing that the use violates nuisance or property laws." (citing *Guimont*, 854 P.2d at 8)).

rejecting the government's takings defenses, the Sixth Circuit has emphasized that a regulatory takings claim is ripe when "the *administrative agency* has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 697 (6th Cir.) (emphasis by Sixth Circuit) (quoting *Williamson County*, 473 U.S. at 191), *cert. denied*, 117 S. Ct. 71 (1996). Following this Court, the First Circuit has held that a property owner need *not* "avail itself of clearly remedial procedures such as those for seeking a *declaratory judgment* regarding the validity of zoning and planning actions taken by local officials." *Teneco Oil Co., Inc. v. Department of Consumer Affairs*, 876 F.2d 1013, 1026 (1st Cir. 1989) (emphasis added) (citing *Williamson County*, 473 U.S. at 193-94).

In contrast to the complementary notion of the California courts that no taking can occur for the period *before* a court is finished resolving a state-law dispute over title to property, the Ninth Circuit has held that when a land-use regulation denies property of all economically viable use, "a court must inquire into whether the use proscription was inherent in the property's title to begin with. If it was not, a total taking *has* occurred." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994); *see also City of St. Petersburg v. Bowen*, 675 So. 2d 626, 630, 632 (Fla. App. 1996) (affirming the conclusion that the property owner "is entitled to compensation for the one year taking of his property," even though the judicial ruling on the government's "affirmative defense" based on nuisance law was rendered in the *very same* proceeding as was the ruling on the owner's takings claim), *cert. denied*, 117 S. Ct. 1120 (1997); *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 647, 649-50 (S.C. App. 1998) (affirming the conclusion that "once the [development] permits were denied, a taking occurred entitling [the property owner] to compensation" (to be determined "as of the date of the taking"), even though the owner had not established, *prior to the takings litigation*, "what rights [he] possessed when he purchased the lots").

In sum, the Federal Circuit, the highest court of Washington State, and other federal and state courts treat regulatory takings claims in a manner that is fundamentally in conflict with the treatment afforded by the decision below and ratified by the California Supreme Court. For that reason, and because the decision below cannot be reconciled with this Court's decisions in *Williamson County* and *First English*, exercise of the Court's certiorari jurisdiction is warranted.

CONCLUSION

> [I]n one area [of takings law] we have arrived at a clear understanding: When the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." In these limited circumstances, government must turn square corners—*except in California.*

Landgate, 953 P.2d at 1212 (Brown, J., dissenting) (emphasis added and citation omitted) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

The petition for a writ of certiorari should be granted.

DATED: June, 1998.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
FILED
JUN 30 1998
OFFICE OF THE CLERK

No. 98 30

In the

Supreme Court of the United States

October Term, 1997

LECHUZA VILLAS WEST,
a California limited partnership,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
STATE OF CALIFORNIA, STATE LANDS COMMISSION,
and MALIBU-ENCINAL
HOME OWNERS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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D. Ruling of same (filed Oct. 8, 1996)

E. Statement of Decision of same (filed June 11, 1996)

F. Staff Report of the California Coastal Commission (dated Jan. 14, 1993)

Appendix A-1

Filed 4/1/98

Second Appellate District, Division Three,
No. B105571/B110008
S067644

IN THE SUPREME COURT OF CALIFORNIA

LECHUZA VILLAS WEST, Respondent

v.

CALIFORNIA COASTAL COMMISSION Et Al., Appellants

and Companion Case

Petition for review DENIED.

GEORGE

Chief Justice

Filed 12/19/97

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE

LECHUZA VILLAS WEST, a CALIFORNIA LIMITED PARTNERSHIP,

Plaintiff and Respondent,

v.

CALIFORNIA COASTAL COMMISSION, STATE OF CALIFORNIA, STATE LANDS COMMISSION, AND MALIBU-ENCINAL HOME OWNERS ASSOCIATION,

Defendants and Appellants.

STATE OF CALIFORNIA and CALIFORNIA COASTAL COMMISSION,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

LECHUZA VILLAS WEST, a California limited partnership,

Real Party in Interest.

B105571 C/W
B110008

(Super. Ct. No. BC076855)

As Modified on Denial of Rehearing Jan. 14, 1998.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1 this opinion is certified for publication with the exception of parts C.4., C.5., C.6., and C.7.

Appeal from a judgment and order of the Superior Court of Los Angeles County. Ernest M. Hiroshige and Robert H. O'Brien, Judges. Judgment in favor of Lechuza Villas West and against Malibu-Encinal Home Owners Association reversed. Appeal of California Coastal Commission, State of California, and State Lands Commission treated as petition for writ of mandate and writ of mandate granted; remanded with directions. California Coastal Commission's appeal from the order suspending the automatic stay dismissed as moot.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Richard M. Frank and Jan S. Stevens, Assistant Attorneys General, Dennis M. Eagan, J. Matthew Rodriquez and Joseph Barbieri, Deputy Attorneys General, Vittal and Sternberg and Terence M. Sternberg for Defendants and Appellants.

Reznik & Reznik, Sherman Oaks, Sherman L. Stacey, Santa Monica, Fred N. Gaines, and L. Elizabeth Strahlstrom, Woodland Hills, for Plaintiff, Respondent and Real Party in Interest.

James S. Burling and Eric Grant, Sacramento, as Amici Curiae on behalf of Plaintiff, Respondent and Real Party in Interest.

CROSKEY, Acting Presiding Justice.

A.

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Lechuza Villas West, a California limited partnership (Lechuza), purchased unimproved beachfront property in Malibu from the Adamson Company for approximately $2 million (the property). The property consists of 17 legally subdivided contiguous lots, on which Lechuza wishes to build up to 17 homes, a 985 foot revetment, and a 1,200 foot road, and is part of Tract No. 10630, which was subdivided by the Marblehead Land Company as shown on a

tract map recorded in 1932 (the 1932 Tract Map).[1] The subdivision was subject to covenants, conditions and restrictions also recorded by the Marblehead Land Company (the CC & Rs), which provided for the formation of a homeowner's association, which association is now known as the Malibu-Encinal Home Owners Association (MEHOA), and which association is a party to this appeal. When Lechuza signed the purchase agreement for the property, it acknowledged that it was aware of possible limitations on development of the property, including (1) potential title claims by the State of California (the State), (2) easement claims by MEHOA, and (3) the fact that the

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[1] "This case presents another chapter in the turbulent legal history of the historic old Rancho Topanga Malibu Sequit. This rancho lies north and west of Santa Monica, in southern California. Originally it contained over 13,000 acres of land, and fronted 22 miles along the Pacific Ocean. [¶] Frederick Hastings Rindge acquired the rancho in 1890. Upon his death in 1905, his widow succeeded to the ownership. She kept the rancho for many years. And she valiantly resisted every encroachment upon or over its vast domain. It was only after extended litigation that a right of way for a road along the coast was secured. (*County of Los Angeles v. Rindge Co.* (1921) 53 Cal.App. 166, 200 P. 27.) [¶] Title to the rancho was put in Marblehead Land Company, a family corporation. Lapse of time, the inexorable demand for land by a population increasing at incredible speed, and the business depression beginning in 1929 accomplished what Mrs. Rindge had feared and fought against for so long. In 1933 Marblehead Land Company found itself in financial difficulties, control of the corporation passed to a board of directors representing bondholders and creditors, and that alien management subdivided and sold a large part of the rancho. (Chap. 10, United States Bankruptcy Act.) [¶] Part of the property so subdivided and sold was located in Malibu Canyon. Malibu Canyon extends northerly from the ocean beach to the precipitous Santa Monica mountains. The beach here runs easterly and westerly. Draining the area is Malibu Creek." (*Gagnon v. Adamson* (1953) 122 Cal.App.2d 253, 254-255, 264 P.2d 620.)

location of the mean[2] high tide line "will have a material effect on the existence, extent, configuration and development potential of Seller's Residential lots."[3]

In 1990 and 1991, even before it had completed its purchase of the property, Lechuza submitted several different development proposals to the California Coastal Commission (hereafter, the "Coastal Commission") to obtain the necessary permits to develop the property. In connection with developing the property, Lechuza also contacted the California State Lands Commission (hereafter, the "Lands Commission") about the proposed location of the residences it intended to construct. In response, the Lands Commission wrote back in March of 1991, stating, in relevant part:

"Based on the information you provided and an analysis of our in-house records and maps, the proposed *residences* appear to be located landward of those surveyed mean high tide lines known to us at this time. Therefore, we will not require a lease or permit. [¶] You should be aware, however, that this office has not made a final determination of the State's boundary at this location. Therefore, we reserve the right to require a lease or permit at some time in the future should it be determined State land is involved. [¶] Our analysis of the limited evidence available of the history of the beach at this location leads us to believe that the beach sand has, at times, been washed completely down to bedrock, resulting in the loss of Sea Level Drive. The State Lands Commission will not be liable for any damage to property that may result from construction, *nor does the Commission agree that it will permit any activity (for*

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[2] The terms "mean" and "ordinary" will be used interchangeably throughout this opinion.

[3] Notably, the recorded CC & Rs themselves expressly contemplated the possibility that the mean high tide line might move so as to modify the location and, in certain circumstances, the size of MEHOA's easement.

example erosion control measures) on its adjacent land, to protect structures that may be developed. [¶] *This letter is not intended, nor should it be construed as, a waiver of any right, title, or interest of the State of California in any lands under its jurisdiction.*" (Italics added.)[4]

All these permit applications were denied, based on the Coastal Commission's findings that the proposed development was inconsistent with various provisions of the Coastal Act, and, specifically, that the proposed revetment, which otherwise "shall be permitted when required to serve coastal dependent uses or to protect *existing* structures" (Public Resources Code, § 30235, italics added), would interfere with the public's right of access, could alter the usable area of beach under public ownership, cause erosion on nearby beaches, and would physically block part of the public beach and encroach on public tidelands. Lechuza filed separate mandate petitions and claims for an unconstitutional taking following the first two denials of its permit applications.[5]

In 1992, following the decision in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 [holding that the regulatory denial of all economically viable use of private property was an unconstitutional taking unless necessary to prevent a nuisance or land use prohibited by state law], the parties agreed to entry, in Case No. SS001187, of a stipulated judgment for remand based on newly discovered relevant information. That stipulated

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[4] Notably, nothing in these letters indicated that the Lands Commission was suggesting that the proposed *revetment*, as opposed to the proposed residences, was landward of the surveyed mean high tide lines as then known to the Lands Commission.

[5] These two mandate proceedings, Los Angeles Superior Court Case Nos. BC030228 and SS001187, were consolidated on December 31, 1991 (collectively, Case No. SS001187).

judgment was entered on January 12, 1993, and provided, in relevant part, that the Coastal Commission would reconsider Lechuza's previously denied permit applications in light of all the evidence produced at the hearing on Lechuza's most recent (and not-yet denied) permit applications.

Perhaps prompted by the *Lucas* decision, the Coastal Commission had contacted the Lands Commission regarding the location of the mean high tide line at the property in question. In a letter dated November 4, 1992, the Lands Commission responded, in relevant part: "Recently, additional and more current evidence (including the studies by Uzes and Weiss referenced in your letter) has been presented to us, which indicates that the mean high tide line has been located on numerous occasions landward of the surveyed lines referenced in our earlier correspondence. The applicant's own engineering study (Weiss) indicates that, on the average, the location of the mean high tide line would be located landward of the [developer's] stringline and therefore within the project area several days every year. There is now a substantial indication that the State's sovereign ownership has extended to land on which portions of the project would be located. Further study could enable a more precise determination of the extent and location of the State's sovereign ownership in the project area. [¶] Unless and until further study indicates otherwise, it is the position of this agency that any activity on this land will require a permit from this agency. . . . [¶] Unfortunately, due to recent budget cuts and resultant staff reductions, we are unable to place high priority on defining the precise extent and location of State sovereign ownership in the Lechuza Beach area at this time. If your applicant [i.e., the developer Lechuza] wishes to pursue this matter further, he should contact [Land's Commission's counsel]. The applicant will be required to pay our costs in addressing the sovereign boundary issue. [¶] Finally, we note that this proposed project could have a significant negative impact on the public's right and ability to navigate and exercise the incidents of navigation in the area . . . [which] are protected

not only by the Coastal Act, but by the California Constitution (Article X, section 4), and numerous court decisions. [¶] We have been informed that the public has used this beach, including the area subject to wave uprush, for navigation and other recreational uses for many years. We therefore recommend . . . that any otherwise permissible project proposed in this area be designed so as to eliminate any potential impact on the public's rights. To the extent any proposed project would interfere with the public's navigational and related rights, we would object to it."

Another public hearing was held in January 1993, after which the Coastal Commission denied Lechuza's consolidated permits, finding, among other things, that the property was subject to a public easement for navigation and that *Lechuza had failed to meet its burden of showing that the project would not encroach on public tidelands.*

On March 15, 1993, Lechuza filed a petition for a writ of mandate and complaint for declaratory relief and damages against the Coastal Commission[6] (collectively, the "complaint"). The petition for a writ was denominated as the first cause of action of the complaint. The complaint also contained a second cause of action for declaratory relief directed at the statutory validity of the Coastal Commission's permit decision (alleging that the Coastal Commission could not prohibit development based on Public Resources Code section 30211 unless a court of competent jurisdiction first had found that the public had acquired a right of access to the sea), a third cause of action, also for declaratory relief (alleging that the Coastal Commission

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[6] In this case, we discuss the separate trial court proceedings involving the Coastal Commission and the Lands Commission. These are both agencies of the State and we recognize that it is a party to all of those proceedings. However, for convenience, we simply will refer to the state parties as the Coastal Commission and the Lands Commission unless the context or the terms of explicit court rulings otherwise require.

could not prohibit all economically viable use of the property unless it found that the proposed uses would constitute a nuisance or that the property owner did not have sufficient rights in its property to allow for the construction of the proposed improvements), a fourth cause of action for damages for a temporary taking of property without just compensation, and a fifth cause of action for a permanent taking. As to this latter count, Lechuza sought $32 million in damages. The writ sought was one directing the Coastal Commission to set aside its denial of Lechuza's coastal development permit applications and to issue a new decision granting such applications subject only to certain appropriate conditions.

In a statement of decision dated December 27, 1994, Judge Robert H. O'Brien (Judge O'Brien),[7] in response the Coastal Commission's motion for an order denying Lechuza's petition for a writ of mandate, noted that he was ruling only on the first and second causes of action because, pursuant to Local Rule 2.5, he had jurisdiction only over writs of mandate and all declaratory relief actions appended thereto, and declined to rule on the third, fourth and fifth causes of action which were then before Judge Hiroshige in a different department. Judge O'Brien then concluded that the Coastal Commission could not determine whether petitioner's project was consistent with Public Resources Code section 30211 without a proper delineation of the boundary between Lechuza's property and the sovereign lands of the State of California, and that the statutory and constitutional validity of the Coastal Commission's permit decision could not be addressed until the proper boundaries had been delineated, that the burden of establishing the location of

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[7] Because the issues in this matter were decided by two different judges, Judge O'Brien and Judge Ernest M. Hiroshige (Judge Hiroshige), and because there is some question as to the interdependence and binding nature of such rulings, we will refer to the decisionmaker by the name of the particular judge involved, rather than using the generic term "the trial court."

the boundary rested on Lechuza, and that Lechuza had failed to establish the location of the boundary. Judge O'Brien rejected Lechuza's contention that the decision in *People v. William Kent Estate Co.* (1966) 242 Cal.App.2d 156, 51 Cal.Rptr. 215 (hereafter, *Kent Estate*) held that tidal boundaries were to be set by a fixed line, and concluded that the estimates of the mean high tide line used by Mr. Uzes, upon which the Coastal Commission relied in denying the permit, were reasonable and constituted substantial evidence supporting an ownership claim by the State of California to portions of the proposed project site. Given such evidence, he concluded that the Coastal Commission had not abused its discretion by denying the permit applications. Judge O'Brien also noted that the Coastal Commission's denial of the permit applications did not definitively establish the boundary line, nor did it determine title; only a quiet title action could have such an effect.

Because the unresolved status of the boundary issue justified denying Lechuza's petition, Judge O'Brien did not reach the issue of the validity of the other findings in support of the Coastal Commission's denial of the permit applications, nor did he reach the issue of whether the Coastal Commission could have approved the project without violating the California Environmental Quality Act, given Lechuza's failure to perform a survey for the Globose Dune Beetle.[8] Judge O'Brien therefore granted the motion to deny the petition, and dismissed the second cause of action. He then directed that judgment not be entered on the first and second causes of action until a decision had been reached on the third, fourth and fifth causes of action. The resolution of those claims required proceeding in a trial department as they were not the proper subject for consideration by a judge exclusively assigned to the determination of writs. Thus, the remaining causes of action were left to Judge

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[8] The Globose Dune Beetle apparently is an endangered species indigenous to the Malibu area.

Hiroshige for further action after Judge O'Brien ruled on the writ.

On July 11, 1995, Lechuza filed a first amended petition for writ of mandate and complaint for declaratory relief, for damages and to quiet title (collectively, the "amended complaint"). The amended complaint added the Lands Commission as a defendant, and also added (1) a sixth cause of action for quiet title against the Lands Commission, seeking to establish that no portion of its lots which lies northerly of a line described in Paragraph 64 of the amended complaint lies seaward of the ordinary high water mark of the Pacific Ocean; (2) a seventh cause of action for quiet title against the Lands Commission, seeking to establish that no public right of navigation exists landward of the ordinary high water mark of the Pacific Ocean upon any portion of Lechuza's lots; and (3) an eighth cause of action for quiet title against the State of California, seeking to establish that no easement for public recreational use exists with respect to any portion of Lechuza's lots lying northerly of the lines described in Paragraph 64 of the amended complaint.

On August 16, 1995, Lechuza again amended its complaint to substitute MEHOA as a defendant in place of one of the Doe defendants, and the parties stipulated that the action could be coordinated with Los Angeles County Superior Court Case No. WEC 145642, a then-pending action by MEHOA against Lechuza to establish private prescriptive rights in the property on behalf of itself and its members. The parties then stipulated that the various issues raised by the coordinated cases would be tried as follows: First, all of the quiet title issues, except for MEHOA's prescriptive easement claim, would be tried. Second, using the boundary determination made in the quiet title trial, MEHOA's prescriptive easement claim would be tried. Third, the takings claims would then be tried.

MEHOA then filed a cross-complaint against Lechuza, and various other defendants, which contained three causes of action:

(1) to quiet its title to an express easement over Lechuza's lots; (2) for a declaration as to the size and location of such express easement for access and recreation over Lechuza's lots; and (3) for a declaration as to MEHOA's rights, under the CC & Rs, to interpret and enforce the CC & Rs against Lechuza's lots (MEHOA's third cause of action). The above-mentioned stipulation as to the order in which the various causes of action would be tried made no mention of MEHOA's third cause of action and how or when it would be tried.[9]

Following trial, Judge Hiroshige issued a statement of decision resolving three related issues: (1) the location of the seaward boundary, (2) the claim of the State of California for a public navigational servitude over those portions of the property covered from time to time by the ebb and flow of the ocean tide, and (3) MEHOA's claim of an *express* easement pursuant to the CC & Rs. As to the boundary issue, Judge Hiroshige concluded that *Kent Estate* had held that "on beaches subject to a fluctuating mean high tide line due to annual erosion and accretion, . . . the ordinary high water mark will constitute an 'average' fixed location of the mean high tide line which then

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[9] According to MEHOA, this is because the stipulation was prepared two months before MEHOA filed its cross-complaint, and because the stipulation was not amended to dispose of MEHOA's third cause of action. MEHOA further claims, while acknowledging that the record does not reflect such fact, that the parties did in fact expressly agree that the third cause of action would be tried as part of the third phase, i.e., the takings phase. Notably, while Lechuza casts various aspersions at MEHOA as to MEHOA's bad faith and reasons for dismissing its third cause of action, it does not deny that the parties agreed that the third cause of action would be tried at the same time as the takings claims.

serves as the seaward boundary between private property and public tidelands."[10]

As to the remaining two issues, Judge Hiroshige concluded that (1) the State of California had no claim to a navigational easement landward of the now-established seaward boundary up to the point at which the highest annual swells might reach, relying on *Aptos Seascape Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 188 Cal.Rptr. 191, and the State also had failed to prove that there had been any implied dedication of an easement for recreational use over the property under the doctrine enunciated in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50, and (2) MEHOA's express easement was to be measured 25 feet landward from the seaward boundary of the property as now-established by the statement of decision. Judge Hiroshige then added, although the only issue as to MEHOA which was to have been tried in the quiet title action was MEHOA's rights as to the express easement, that "MEHOA has failed to meet its burden of proof *as to all other claims set forth in MEHOA's Cross-Complaint.*" (Italics added.)

Based on this statement of decision, filed on June 11, 1996, Judge Hiroshige entered judgment as to Lechuza's sixth, seventh and eighth causes of action, as to all the causes of action in the cross-complaint filed by the State of California and the Lands Commission (i.e., a partial, and hence nonappealable judgment as between Lechuza and the State of California and the Lands Commission), and as to all causes of action in MEHOA's cross-complaint (i.e., a final, and hence appealable, judgment as to MEHOA) (hereinafter, "the June 11, 1996 judgment").

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[10] Judge Hiroshige adopted as his decision the reasoning and authorities contained in Lechuza's Offer of Proof in Support of Determination of a Fixed Seaward Boundary, filed November 13, 1995.

The Lands Commission and MEHOA filed notices of appeal from the June 11, 1996 judgment. Lechuza filed a notice of cross-appeal with respect to the establishment of a seaward boundary at a location other than that depicted on a recorded 1932 tract map of the property, and as to the determination that MEHOA's express easement is located 25 feet landward of the boundary as established by the judgment. Lechuza also filed a "supplemental" notice of cross-appeal as to Judge O'Brien's original denial of its petition for a writ of mandate.

After trial of the quiet title action, the Coastal Commission moved for summary judgment on the ground that the takings claims were not ripe for judicial determination because Lechuza's project impermissibly encroached on MEHOA's express easement as established by Judge Hiroshige's determination of the fixed seaward boundary, and therefore the project needed to be redesigned and resubmitted. The Coastal Commission also moved for judgment on the pleadings on the ground that Lechuza had failed to meet the reapplication requirement of the ripeness doctrine because the denial of the project was not a final determination in the absence of a showing that Lechuza had sought permits for a revised project after the denial of its application. Lechuza, too, filed a motion for summary adjudication on the Coastal Commission's liability for a taking, which was opposed by the Coastal Commission on the ground that there were triable issues of material fact as well as on various legal grounds.

Judge Hiroshige granted Lechuza's motion for summary judgment on liability for a temporary taking, based on his conclusion that the Coastal Commission had improperly relied on an ambulatory seaward boundary line, and on his determination that the other bases upon which the Coastal Commission had denied the permit applications, e.g., threats to public access posed by the revetment and geologic hazards inherent in the bluff-face location, were "purported legitimate[] state interests [which] have been rejected by *Lucas*." Judge

Hiroshige denied Lechuza's motion for summary judgment on the permanent taking issue, concluding that Lechuza must first resolve MEHOA's easement claims, and that such claim was not ripe because the project would need to be redesigned to avoid encroachment on MEHOA's express easement. The issue of damages for the temporary taking claim was set for trial at a later date.

Lechuza then filed a motion for remand to the Coastal Commission pursuant to Code of Civil Procedure section 1094.5, subdivision (e). This motion was directed to Judge Hiroshige, rather than Judge O'Brien, on the ground that Judge Hiroshige's boundary determination and summary judgment on the temporary taking issue constituted new evidence within the meaning of Code of Civil Procedure section 1094.5, subdivision (f), thus allowing remand to the Coastal Commission. Over the Coastal Commission's objections, Judge Hiroshige granted the motion for remand, entered a partial judgment on Lechuza's petition for a writ of mandamus, and issued a peremptory writ of mandate directing the Coastal Commission to set aside its denial of Lechuza's permit applications based on Judge Hiroshige's "relevant rulings." Judge Hiroshige also ordered the Coastal Commission to reconsider the permit applications at the Coastal Commission's next meeting.

The Coastal Commission refused to follow such directions and, instead, conducted a closed litigation session to consider the peremptory writ, and then announced it had authorized the Attorney General to file an appeal. Judge Hiroshige granted Lechuza's subsequent ex parte application that the appeal not operate as a stay of execution of the partial judgment, and that the peremptory writ remain in full force and effect, except that he amended the writ to require the Coastal Commission to reconsider the permit applications at its *next* meeting. The Coastal Commission appealed both the June 11, 1996 judgment and the lifting of the automatic stay, and petitioned this court for a writ of mandate to stay the pending trial on damages for the

temporary taking and the requirement that it hear the remanded permit applications at its next meeting. We issued a writ of supersedeas, consolidated the quiet title, takings and mandate appeals with the appellate mandate proceeding, and expedited them for review.

Because the State's, the Coastal Commission's, and the Lands Commissions' purported appeals are from the June 11, 1996 nonappealable "partial judgment" (see *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744, 29 Cal.Rptr.2d 804, 872 P.2d 143), we treat them as petitions for extraordinary relief, given that the case in its present posture presents unusual circumstances making it appropriate to ascertain from the record whether there are substantive errors that we should, by writ, order the trial court to correct. Judicial economy would not be served in this case by deferring resolution of the issues decided by Judge Hiroshige until final judgment on all of Lechuza's causes of action, particularly given (1) Judge Hiroshige's decision sending the matter back to the Coastal Commission for reconsideration of Lechuza's permit applications based on his decision in the quiet title action before the quiet title decision was final, and (2) the extensive briefing of the relevant issues not only by the parties, but also by amicus curiae who seek clarification of an area of law with a potential effect on significant areas of California land. Further proceedings in the trial court would be unlikely to improve upon the record or briefing now presented to us for resolving the questions raised by this case. In addition, the continuing public interest in the present issue and its likely recurrence is another unusual circumstance indicating that we should resolve the issue here. (*Id.* at pp. 744-746, 29 Cal.Rptr.2d 804, 872 P.2d 143.)

Because the June 11, 1996 judgment is actually a final judgment as between MEHOA and Lechuza which resolves all issues between those parties, MEHOA's appeal from the June 11, 1996 judgment is, in fact, a proper appeal.

B.

CONTENTIONS ON APPEAL

The Coastal Commission contends: (1) Judge Hiroshige erred by granting Lechuza's motion to remand under Code of Civil Procedure section 1094.5, subdivision (e), because Judge O'Brien had already adjudicated the mandate petition and any attempt to reconsider Judge O'Brien's decision should have been directed to Judge O'Brien; (2) the partial judgment should be reversed because it is premised on an erroneous determination that the Coastal Commission misapplied coastal boundary law; (3) the partial judgment should be reversed because it is premised on the erroneous determination that the Coastal Commission engaged in a taking, and the order granting summary adjudication on the issue of taking liability should be vacated; (4) even if Judge Hiroshige did not err in determining the location of the seaward boundary, the order granting summary adjudication on the issue of taking liability should be vacated because: (a) Judge Hiroshige's finding that the Coastal Commission erred in denying the permit application required him to overrule Judge O'Brien's decision upholding the Coastal Commission's decision to deny the permit applications; or (b) Lechuza's taking claim was not ripe because the Coastal Commission had not yet reviewed the permit applications in light of the judicially-established seaward boundary; or (c) Lechuza's taking claim was not ripe because its project encroached on MEHOA's express easement and the Coastal Commission could not render a final decision until Lechuza redesigned its plans to avoid such encroachment; or (d) in the absence of the submission of a less intrusive project, there was no basis for concluding that the permit denial was tne Coastal Commission's final and authoritative determination of the type and intensity of development legally permitted on the property; (5) Lechuza's motion for summary adjudication should have been denied because there were numerous triable issues of material fact and because the evidence offered in support of the

motion was defective; and (6) the Coastal Commission's appeal of the trial court's order suspending the automatic stay under Code of Civil Procedure section 1110b should be dismissed as moot.

The Lands Commission contends: (1) Judge Hiroshige erred by concluding that the southerly boundary line is fixed rather than ambulatory; (2) even if *Kent Estate* had precedential value for the proposition that a fixed boundary line between the ocean and the shore is proper, the use of a fixed, average line would not be proper under the circumstances of this case; (3) the public has navigational and recreational rights that follow the ocean's navigable waters, which waters, and concomitant rights, routinely extend past the ordinary high tide line and the fee ownership line of Lechuza Beach, and therefore Judge Hiroshige erred by concluding that Lechuza's property was not subject to such public navigational and recreational rights; and (4) Judge Hiroshige abused his discretion by denying the Lands Commission's motion for a new trial and imposing sanctions on the Lands Commission for bringing the motion for a new trial.

MEHOA contends: (1) if the partial judgment is reversed because the boundary line was improperly determined, then the judgment between MEHOA and Lechuza establishing the location of the easement also must be modified accordingly; (2) the award of attorney fees to Lechuza and against MEHOA pursuant to Civil Code section 1354 was error because Lechuza was not the prevailing party; (3) Judge Hiroshige erred by vacating MEHOA's voluntary dismissal of its third cause of action (for a declaration that the CC & Rs applicable to it and its members also applied to Lechuza's property, and that MEHOA and its Architectural Committee have the right and power to interpret and enforce the CC & Rs) and by awarding sanctions against MEHOA for dismissing such cause of action; (4) Judge Hiroshige abused his discretion by awarding sanctions against MEHOA; and (5) Judge Hiroshige erred by denying MEHOA's motion to strike Lechuza's cost bill as untimely.

Lechuza disputes each of these contentions. In addition, as cross-appellant, Lechuza contends that (1) the recorded 1932 tract map delineates the legal boundaries of the property and/or that alternatively, the seaward line shown on that map constitutes an agreed-upon boundary line and hence the legal boundary line; and (2) there is no public easement landward of the seaward boundary line as to any land over which tidal waters may extend from time to time.[11] The State of California, acting by and through the Lands Commission, disputes Lechuza's contention that the boundary was permanently fixed by the 1932 tract map or by agreement.

C.

DISCUSSION

1. *Judge Hiroshige Erred by Granting Lechuza's Motion to Remand Pursuant to Code of Civil Procedure Section 1094.5, Subdivision (e)*

The Coastal Commission contends that Judge Hiroshige erred by issuing a peremptory writ of mandate directing the

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[11] Actually, this second issue is not properly a matter for a cross-appeal. Judge Hiroshige's June 11, 1996 judgment held that (1) the State of California had failed to prove the existence of a public easement in navigable waters for recreational purposes that existed independently of its claim of ownership to tide and submerged lands, and therefore the subject property was not encumbered by such an easement and (2) the State of California had failed to establish the existence of an easement for public recreational use based on implied dedication under the doctrine in *Gion v. City of Santa Cruz, supra*, 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50, and therefore the subject property was not encumbered by such an easement. In other words, Lechuza prevailed in the lower court on this issue, so it is not aggrieved for purposes of appealing from this portion of the judgment. Instead, Lechuza really disputes the Lands Commission's contention on appeal that Judge Hiroshige erred by concluding that there are no public recreational rights over privately owned lands when such lands are covered by the ocean's waters.

Coastal Commission to reconsider Lechuza's permit applications based on Judge Hiroshige's conclusion as to the location of the legal southerly boundary because (1) Code of Civil Procedure section 1094.5 does not allow him to reopen the mandate proceedings that already had been concluded by Judge O'Brien, and (2) Judge Hiroshige had no jurisdiction to overrule Judge O'Brien's decision to deny the petition for a writ of mandate. Lechuza contends that Judge Hiroshige's actions were appropriate, citing *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 155 Cal.Rptr. 63, *Curtis v. Board of Retirement* (1986) 177 Cal.App.3d 293, 223 Cal.Rptr. 123, and *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 233 Cal.Rptr. 708.

Code of Civil Procedure section 1094.5 provides for judicial review of administrative orders or decisions. (Code Civ. Proc., § 1094.5(a).) The scope of such review is "whether the [administrative agency] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5(b).) Abuse of discretion is established if the administrative agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (*Ibid.*) It was pursuant to this section that Lechuza sought review of the Coastal Commission's denial of its permit applications, and pursuant to which section Judge O'Brien reviewed the Coastal Commission's denial of the permit applications and denied Lechuza's petition for a writ of administrative mandamus, having concluded that the Coastal Commission had not abused its discretion by denying the permit applications.

Code of Civil Procedure section 1094.5, subdivision (e), the subdivision pursuant to which Judge Hiroshige issued a peremptory writ of mandate commanding the Coastal Commission to set aside its permit denial and to reconsider Lechuza's permit applications based on "the relevant rulings of

the Court in this action" provides: "Where the court finds that there is relevant evidence which, in the exercise of reasonable discretion, could not have been produced ("new evidence") or which was improperly excluded at the hearing before [the administrative agency], it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."[12]

Here, Judge Hiroshige remanded the matter to the Coastal Commission for reconsideration based on the "new evidence" of the now legally-determined seaward boundary. However, this was not newly discovered evidence which, in the exercise of reasonable discretion, could not have been produced or which was improperly excluded at the hearing before the Coastal Commission. As the Coastal Commission and the Lands Commission point out, there was no reason that Lechuza could not have established the legal boundary of the property before it proceeded with any of its multiple permit applications. Therefore, there was no legal basis upon which the matter could be remanded for reconsideration; instead, Lechuza's proper remedy would have been to resubmit permit applications based on the legally established boundary. However, as the nature of the extant proceeding shows, such a resubmission (not to mention a writ commanding reconsideration) would have been

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[12] Subdivision (f) of section 1094.5 provides: "The court shall enter judgment either commanding [the administrative agency] to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order [the administrative agency] to take such further action as is specifically enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the [administrative agency]."

premature until the judicial decision as to the legal boundary became final.

This resolves the takings issue as well. Although Judge Hiroshige found that there had been a temporary taking of Lechuza's property, there can be no *taking*, temporary or permanent, until there is a final governmental determination which deprives the property owner of all or substantially all economic use of his or her property. (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773-774, 66 Cal.Rptr.2d 672, 941 P.2d 851; *Twain Harte Associates, Ltd. v. County of Tuolumne* (1990) 217 Cal.App.3d 71, 88-89, 265 Cal.Rptr. 737.) There has been no such final determination here. In *Lucas*, the Supreme Court held that a regulation which denied a coastal owner the right to any construction on or other beneficial use of his property would constitute a compensable taking if, under state law, a right to develop the land existed prior to enactment of the challenged regulation. Here, Lechuza did not establish that it had such a right to develop "its" property as requested in its permit applications, given that it had not established the location of the legal boundary and of MEHOA's express easement.

2. *The Legal Boundary Line Is Ambulatory, Not Fixed*

Both the Coastal Commission and the Lands Commission contend that Judge Hiroshige erred by determining that the boundary line between Lechuza's property and that of the State of California is a fixed line based on the mathematical average of 37 surveys of the mean high tide line. They argue that instead, the proper boundary between the State's tidelands and Lechuza's private property is a line which moves as the ordinary high tide (a fixed plane) intersects the shifting sands from day to day.

Tidelands are those lands lying between the lines of mean high and mean low tide which are covered and uncovered successively by the ebb and flow thereof. (*Marks v. Whitney*

(1971) 6 Cal.3d 251, 257-258, 98 Cal.Rptr. 790, 491 P.2d 374.) The state owns all tidelands below the ordinary high water mark, and holds such lands in trust for the public (Civ.Code, § 670; *State Lands Com. v. Superior Court (Lovelace)* (1995) 11 Cal.4th 50, 63, 44 Cal.Rptr.2d 399, 900 P.2d 648), while the owners of land bordering on tidelands take to the ordinary high-water mark. (Civ.Code, § 830; *State Lands Com. v. Superior Court (Lovelace), supra*, 11 Cal.4th at p. 63, 44 Cal.Rptr.2d 399, 900 P.2d 648.) The high water mark is the mark made by the fixed plane of high tide where it touches the land; as the land along a body of water gradually builds up or erodes, the ordinary high water mark necessarily moves, and thus the mark or line of mean high tide, i.e., the legal boundary, also moves. (*City of Oakland v. Buteau* (1919) 180 Cal. 83, 179 P. 170; *Kent Estate, supra*, 242 Cal.App.2d at p. 160, 51 Cal.Rptr. 215.)[13]

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[13] This has long been a staple of the common law. As our Supreme Court pointed out in 1916, "The proposition [that a boundary marked by the mean high tide line remains fixed at the location of the mean high tide line as it was situated on some particular past date] is contrary to the great weight of authority. The act of April 13, 1850, declared that the common law of England shall be the rule of decision in this state, where it is not repugnant to the federal or state constitution or to the statutes of the state. (Stats.1850, c. 95, p. 219.) This provision is now a part of our Political Code. (Sec. 4468.) The law of alluvion is thus stated by Blackstone: 'And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.' [Citation.]" (*Strand Improvement Co. v. Long Beach* (1916) 173 Cal. 765, 771, 161 P. 975.)

(continued...)

In *Kent Estate, supra,* 242 Cal.App.2d 156, 51 Cal.Rptr. 215, on the interpretation of which Judge Hiroshige and Judge O'Brien parted company, the defendant owned a sandspit bounded on one side by the Pacific Ocean and on the other side by a lagoon. The state owned the submerged lands. After a state survey, the defendant brought a quiet title action, and a decree was entered in 1950. The defendant subdivided the land and sold some lots. It also drove a line of iron stakes, several feet apart, into the sand at a right angle with the sea, thus forming a fence, and posted "no trespassing" signs. The state contended that the fence extended into state property and constituted a public nuisance, and sued for injunctive relief (*not* quiet title).

The evidence presented showed that the mean high tide could be established by visual reference to a monument or bench mark of the U.S. Coast and Geodetic Survey. There was also evidence that the sand built up seaward during the summer months, thus increasing the beach area, and that the sand was washed away during the winter months, thus decreasing the beach area. The movement of the sand could account for an annual variation of as much as 80 feet in the point at which the water, at ordinary high tide, touched the shore line.

The trial court enjoined the defendant from interfering with the public's use of the land lying seaward of the ordinary high

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[13] (...continued)
Here, the only evidence was that the changes to the shoreline between Lechuza's property and that of the State were gradual, imperceptible, and the result of natural causes. Therefore the legal boundary line between Lechuza's property and the State's tidelands moves back and forth with the gradual, seasonal accretion and erosion of the shore. (*State Lands Com. v. Superior Court (Lovelace), supra,* 11 Cal.4th at pp. 63-69, 44 Cal.Rptr.2d 399, 900 P.2d 648.) There is no legal authority for Lechuza's position that the difference between regular seasonal accretion and erosion should be or must be "split" between the two landowners by way of a permanently fixed boundary line.

water mark, but declined to fix the location of such mark. It termed the boundary between the defendant's and the state's lands to be the "ordinary high water mark of the Pacific Ocean as it may fluctuate naturally from time to time." The trial court also found that the defendant's fence "'extends or may extend from time to time seaward of [the] ordinary high water mark,'" and that "'from time to time, the ordinary high water mark . . . migrates landward due to natural erosion and seaward due to natural accretion.'" (242 Cal.App.2d at p. 158, 51 Cal.Rptr. 215.)

The defendant appealed, and the First District Court of Appeal reversed. The reviewing court first rejected the defendant's argument that the 1950 decree established the then-state survey line as the fixed seaward boundary, noting that the decree, as to the seaward boundary, made no reference to the state survey, in contrast to the decree's reference to the lagoonward boundary as being the "'low water mark in [the lagoon], as fixed by the . . . State survey.'" (*Id.* at p. 159, 51 Cal.Rptr. 215.) It then held that the trial court's determination of the seaward boundary was too uncertain to be enforced, noting that some of the uncertainty stemmed from the trial court's view that the ordinary high water mark is itself a fluctuating, variable or migrating line. (*Ibid.*) According to the reviewing court, ordinary high tide is determined by averaging high tides over a period of 18.6 years. This average represents the height or elevation of a plane of water, which, once determined, becomes a fixed figure, readily ascertainable by reference to monuments and tidal data of the U.S. Coast and Geodetic Survey. Thus, to the extent that the *Kent Estate* trial court's findings, conclusions, and judgment implied that ordinary high tide is a variable plane, they were in error. (*Id.* at p. 160, 51 Cal.Rptr. 215.)[14]

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[14] The court in *Kent Estate, supra,* merely stated that to the extent the trial court's findings, conclusions, and judgment implied that ordinary

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The *Kent Estate* court then made a distinction between the ordinary high tide (an unvarying plane) on the one hand, and, on the other hand, the boundary line created at the point at which the plane of average high tide meets the land, which line *may* vary: "To the extent that the land itself moves, as is the case of the sandy beach here in issue, this line does vary." (*Ibid.*) It then concluded that the evidence before the trial court did not support the trial court's finding that the boundary in this case actually migrated back and forth between the land and sea due to natural erosion (more properly termed deliction) and accretion, given that according to case law, only gradual, "imperceptible" changes in land mass constitute accretion and/or deliction, and the evidence showed a change of some 80 feet between the summer and winter months--"hardly . . . gradual and imperceptible" changes, which thus could not "meet the definitions of natural accretion and deliction." (*Ibid.*)

Having concluded the evidence did not support the trial court's finding that there was natural accretion and/or deliction (upon which finding rested the trial court's conclusion that the boundary line migrated from time to time), the court then considered what might be accomplished upon retrial. Noting that "the 'almost mathematical line bounding Blackacre' [citation] cannot be achieved, but somewhat greater certainty should be possible than the constantly moving line contemplated by the present decree[,]" and that "[i]f not, [then] the trial court should consider whether the uncertainty is so great as to warrant denial of injunctive relief [citation][,]" the reviewing court suggested that upon retrial the parties should determine whether the change in land mass was substantially the same each year,

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[14] (...continued)
high tide is a variable plane, "they impart uncertainty." (242 Cal. App.2d at p. 160, 51 Cal.Rptr. 215.) However, because the reviewing court held that the plane of average high tide did not vary, it is inferable that it also held that the trial court *erred* to the extent it concluded that such *plane* varied.

which would "thus afford[ ] a basis for fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line." (*Id.* at p. 161, 51 Cal.Rptr. 215.)

Thus, the *Kent Estate* court did *not* hold that the boundary line created by the points at which the plane of the average high tide meets the land cannot vary. *Instead, it specifically recognized that such a boundary line may vary to the extent the land itself moves.* It also suggested that a fluctuating boundary line might warrant denial of injunctive relief, and *suggested, without so holding,* that one way to create some certainty as to a boundary might be to calculate an average or ordinary line of the shore against which the plane of the ordinary high tide could be placed to create a reasonably definite boundary line.

The principle relied upon by the reviewing court in *Kent Estate, supra,* that a coastal boundary line may move back and forth with erosion and accretion, is thus in keeping with the earlier authority of *City of Oakland v. Buteau, supra,* 180 Cal. 83, 179 P. 170. In that case, the City of Oakland had obtained a judgment condemning for public use certain property held in trust for Merritt Hospital to the extent such property lay above the line of "ship channel."[15] Part of the property condemned was above the line of low tide, and part was below the low tide line. Thereafter, the city brought suit to recover possession of the land lying below "ship channel," which the hospital used for wharfing purposes. In *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 50 P. 277, the California Supreme Court had held that "ship channel" as used in the act of May 4, 1852, meant the low tide line, and the city and the hospital both agreed that the issue therefore was the location of the boundary at the low tide line. However, the city took the position that the southerly boundary of the property was the line of low tide as it existed on May 4,

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[15] The hospital's title derived from an act by the Legislature of May 4, 1852 granting to the town which was the predecessor of the City of Oakland the lands lying "between high tide and ship channel."

1852, while the hospital took the position that the boundary described in the act was the line of low tide as it might appear from time to time.

The California Supreme Court held that both as to lands bordered by streams, i.e., riparian lands, and lands bounded by tidal water, i.e., littoral lands, it was "unquestioned law" that "*a boundary marked by a water line is a shifting boundary, going landward with erosion and waterward with accretion.*" (*City of Oakland v. Buteau, supra,* 180 Cal. at p. 87, 179 P. 170, emphasis added.) The court considered the practical problems involved in a shifting boundary line, noting, "To the suggestion that a boundary shifting with the location of the tide line would be incapable of definite ascertainment, we respond that in our judgment such a line is more readily susceptible of location on the ground than a line not marked by permanent monuments, and to be determined by conditions as they existed many years ago." It then concluded that the southerly boundary of the land formerly owned by the hospital was the "low tide line *as it might exist from time to time,*" and that the city, as the party seeking possession of the land, either was required to show affirmatively that the low tide line as of the time it instituted the condemnation suit was at or north of the northerly boundary of the property described in its complaint or to acquire by condemnation or purchase the land between the low-tide line of May 4, 1852 and the low-tide line of the date of such acquisition. (*Id.* at pp. 90-91, 179 P. 170, italics added.)[16] As noted above, Lechuza took

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[16] Several other cases discussed by the parties bear some mention. Lechuza relies on *County of Lake v. Smith* (1991) 228 Cal.App.3d 214, 278 Cal.Rptr. 809 for the proposition that "extreme" positions of water should not be used as a shoreline boundary in place of either a boundary based upon an average-water-level or a boundary which the parties had agreed upon. Although the court in *County of Lake* referred to the decision in *Kent Estate* (*id.* at p. 225, 278 Cal.Rptr. 809), such reference was (1) based on the erroneous assumption that *Kent Estate* held that a boundary along the ocean's waters could not

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a cross-appeal from Judge Hiroshige's determination that the seaward boundary is located anywhere other than at the location depicted on the recorded 1932 tract map for Tract 10630. In other words, Lechuza's fall-back position is that even though a boundary along the ocean *legally may* be ambulatory rather than fixed, the particular boundary here *was* fixed. According to Lechuza, the recorded 1932 tract map delineates the legal boundaries of the property as the line of mean high tide as surveyed on July 23, 1932, and the government's acceptance and recordation of the 1932 tract map pursuant to the guidelines set forth in the Subdivision Map Act has conclusively established the boundaries of the subject property. As to the first of these points, Lechuza cites no authority for the proposition that the reference on a tract map to the mean high tide as surveyed *on a particular date* in and of itself establishes such otherwise undefined line as the legal boundary thenceforth, regardless of

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[16] (...continued)
move and had to be fixed, (2) irrelevant, given that *County of Lake* involved nontidal waters, i.e., the waters of a lake, and (3) dicta, given that the court in *County of Lake* did not adopt an average water elevation as a basis for establishing the legal boundary, but instead used a boundary line established in a prior court decree. (*Id.* at pp. 235-237, 278 Cal.Rptr. 809.)

The case of *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.* (1994) 24 Cal.App.4th 1050, 29 Cal.Rptr.2d 518, also cited by both Lechuza and the Lands Commission, merely held that "mean high tide" means exactly that, not "highest recorded high tide" (*id.* at p. 1059, 29 Cal.Rptr.2d 518), and reiterated that the common law boundary of the tidelands is the mean high tide line. (*Id.* at pp. 1060-1061, 29 Cal.Rptr.2d 518.) The case did not hold that the boundary set by the mean high tide line was or should be fixed, and, in fact, intimated just the opposite. (*Id.* at p. 1058, 29 Cal.Rptr. 2d 518 ["the line of mean high tide itself is always, by definition, a line 'subject to tidal action';"]; *id.* at p. 1060, 29 Cal.Rptr.2d 518 ["by the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.' [Citation.]."])

how the mean high tide or shoreline's profile may vary over the years. Its lack of citation to any authority is not surprising, as explained below.

First, the general rule is that a line shown on a map which runs along the edge of the ocean is a meander line, used to ascertain the quantity of land subject to sale and to show the sinuosities of the shore, and that the high tide line, not the meander line, is the true, legal boundary. (*Los Angeles v. San Pedro etc. R.R. Co.* (1920) 182 Cal. 652, 654-655, 189 P. 449; *Aptos Seascape Corp. v. County of Santa Cruz, supra,* 138 Cal.App.3d at pp. 504-505, 188 Cal.Rptr. 191.)

Second, in a deed, as in any contract, a court must attempt to ascertain the intent of the parties by first looking to the language in the deed, as construed in light of any extrinsic evidence which may prove a meaning to which the language of the instrument is reasonably susceptible. (*City of Manhattan Beach v. Superior Court (Farquhar)* (1996) 13 Cal.4th 232, 238, 52 Cal.Rptr.2d 82, 914 P.2d 160; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 521, 67 Cal.Rptr. 761, 439 P.2d 889; *City and County of San Francisco v. Union Pacific R. Co.* (1996) 50 Cal.App.4th 987, 994, 58 Cal.Rptr.2d 1.) Here, while the parties do not point to the deeds by which Marblehead Land Company conveyed title to the lots, they do refer to the recorded CC & Rs, which, by their terms, applied to "[a]ll real property contained within the exterior boundary lines of Tract No. 10630." The CC & Rs identify an easement for access and recreation on the beach (i.e., the express easement claimed by MEHOA over Lechuza's property, i.e., Lots 141 through 159) as follows:

"28. Lots 124 to 139, inclusive, and Lots 141 to 159, inclusive, shall be subject to an easement, and said easement is hereby reserved, in favor of Grantor, its successors in interest and assigns, each and every home owner in said Tract No. 10630, . . . Said easement shall be used for pedestrian travel, bathing and recreational purposes, and all purposes

incidental thereto, and not for other purposes and not for the purposes of camping, erecting tents, or buildings, landing or launching boats, or maintaining concessions or lighting fires. . . . On Lots 141 to 159, inclusive, said easement shall include the southerly twenty-five (25') feet of each and all aforesaid lots, being a strip of land twenty-five feet (25') in width, lying within said Lots 141 to 159, inclusive, and bounded on the south by the southerly lines of said lots, on the east by the easterly line of Lot 141, and on the west by the westerly line of Lot 159, a*s such lines are delineated on the recorded map and/or maps herein referred to, and also all land that may now or hereafter be located between said lots and the ordinary high water mark of the Pacific Ocean, except where said northerly line of said easement shall be at an elevation greater than five feet (5') above said ordinary high water mark line, in which event said five foot elevation line above said ordinary high water mark shall become the northerly line of said easement; provided, however, in no event shall said easement be less than ten feet (10') inland from said ordinary high water line.*"

Applying the above-noted rule of interpretation to the CC & Rs, along with the general rule that a boundary along the edge of a body of water follows the water line itself, we conclude that the only reasonable interpretation of the line shown on the 1932 tract map is that the Marblehead Land Company intended that the southerly boundary of the lots in question was to be defined by the mean tide line *as it might exist from time to time*, not by a static line defined by the mean high tide line as it existed as surveyed on July 23, 1932, and that the fact the meander line showed that it was based on a survey of a particular date was irrelevant on the issue of the legal southerly boundary.

Having so concluded, Lechuza's second proposition, that the government's acceptance and recordation of the 1932 tract map pursuant to the guidelines set forth in the Subdivision Map Act has conclusively established the boundaries of the subject property, also is irrelevant; if true, it merely leads to a conclusion

that the boundary so established is one which moves with the intersection of the plane of ordinary high tide and the shore.[17]

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[17] Alternatively, Lechuza's second proposition is simply wrong. Of the cases cited by Lechuza in support of its assertion that the acceptance and recordation of the tract map conclusively established the seaward boundary, arguably the most applicable of such cases is *Abbot Kinney Co. v. City of Los Angeles* (1959) 53 Cal.2d 52, 346 P.2d 385 (*Abbot Kinney*), which Lechuza characterizes as a case in which a "tract map provided conclusive evidence of [the] location of [the] seaward boundary depicted thereon as 'Ocean.'" However, that case does not so hold.

In *Abbot Kinney*, plaintiffs were private citizens who held a reversionary interest in ocean front property conveyed to the City of Los Angeles for use as a park or beach, and who sued to recover title on the grounds that the City, by constructing a parking lot and restrooms on such property, had breached the conditions in the deed. The trial court granted judgment in favor of the plaintiffs, but then granted the city a new trial. Both parties appealed, and the California Supreme Court held that the trial court had lacked jurisdiction because the state was a necessary party, because there was an issue as to whether the plaintiffs' predecessor in interest or the state, which had granted to the city the tidelands within the city's borders, had owned those portions of the property seaward of the mean high tide line. (53 Cal.2d at p. 57, 346 P.2d 385.) This was an issue because the plaintiffs claimed that their title derived from a Mexican grant, and the grant of tidelands by the state to the city specifically excepted therefrom any property held or claimed under, through or from a Mexican grant. After holding that the trial court lacked jurisdiction, the court noted, in *dicta*, that nothing in the record supported the plaintiffs' premise that the Mexican grant included lands seaward of the mean high tide line, i.e., any tidelands, given that, absent any showing to the contrary, the upland owner obtains title only to the high water mark, and given that the tract maps filed as exhibits showed the westerly, i.e., seaward, boundary of the property as "Ocean," which *implied* that the mean high tide line was the boundary. (*Id.* at pp. 57-58, 346 P.2d 385.) In other words, the court was not asked to consider whether a tract map which showed the

(continued...)

Lechuza implies that there is such an inherent problem with a moving boundary line that some special onus lies on us to clarify or provide practical direction to the trial court as to how to "quiet title to a moving boundary." Title is not quieted as to boundaries, moving or otherwise; it is quieted as to legal interests in property. "Such an action is brought, as authorized by the statute, 'for the purpose of determining' any adverse claim that may be asserted therein by a defendant to the land in controversy; and this does not mean that the court is simply to ascertain, as against a plaintiff shown to have a legal interest, whether or not such defendant has some interest, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to. Of course, if the plaintiff fails to show any legal interest in the property in controversy, and as to which he asserts title, he must fail altogether, and could not complain of a judgment of nonsuit, but where he shows any legal interest he is entitled to have that interest declared by the court. [Citations.]" (*Peterson v. Gibbs* (1905) 147 Cal. 1, 5, 81 P. 121.)

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[17] (...continued)
seaward boundary as "Ocean" conclusively established that the legal boundary was the mean high tide line, let alone whether such boundary was fixed or ambulatory.

In contrast to Lechuza's lack of authority for the proposition that a tract map conclusively establishes a legal boundary, there *is* authority which holds that although maps showing the boundaries of lots are some evidence which may create a question of fact as to the true boundaries, such maps are not conclusive as to the legal boundaries. (*City of Los Angeles v. Duncan* (1933) 130 Cal.App. 11, 13-14, 14-15, 19 P.2d 289; *City of Oakland v. Wheeler* (1917) 34 Cal.App. 442, 450-452, 168 P. 23.)

In our disposition of this appeal, we have directed the trial court that any judgment in Lechuza's quiet title action must make it clear that the southerly boundary line between Lechuza's property and the public tidelands is an ambulatory line which moves as described in the opinion, i.e., that the legal boundary line between the shoreline and the ocean is the line where the plane of the ordinary or mean high tide meets the shifting sand from time to time. "[T]he rule is that the *description* in a judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain description, or no description at all, renders the judgment erroneous and void.' (*Newport v. Hatton* [1924] 195 Cal. 132, 156, 231 P. 987, 996.)" (*Newman v. Cornelius* (1970) 3 Cal. App.3d 279, 284, 83 Cal.Rptr. 435, italics added.) A description of the southerly boundary as an ambulatory line where the plane of ordinary or mean high tide meets the shifting sand from time to time is certain and specific, not impossible, wrong or uncertain. The fact that the boundary line itself may move does not mean that the *description* of the boundary, too, is changeable.

A description of the parties' legal interests in real property is all that can be expected of a judgment in an action to quiet title. The other problems faced by Lechuza, e.g., whether to risk building on land it has legal title to today but which may become tidelands as a result of natural forces, are not properly resolvable in such an action. It is clear that Lechuza's desired outcome has been not to have legal title declared as it really is, which is the effect of a successful action to quiet title, but instead to obtain a judgment changing the title to some portion of the property, i.e., to vest in itself permanent legal title over land which, because it is bordered by the ocean and is subject to seasonal accretion and erosion, belongs sometimes to the state and sometimes to Lechuza. This cannot be done by an action to quiet title. (See *Harrigan v. Mowry* (1890) 84 Cal. 456, 458-459, 22 P. 658.)

3. *Judge Hiroshige Did Nor Err When He Concluded that the Public Has No Recreational Rights Over Lechuza's Privately-Owned Property Based on a Theory that the Water Which Occasionally Flows Inland Over the Legal Boundary is "Navigable Water"*

The Lands Commission contends that Judge Hiroshige erred by concluding that the public has no recreational rights in the ocean waters which extend over Lechuza's privately owned property, i.e., that the public has no right to walk in the water which flows above the line where the plane of ordinary high tide intersects the shore.

At trial, the Lands Commission presented evidence that because the plane of the ordinary high tide consists of an average of the high tide elevations, approximately 14 percent of the time the high tide will flow past the legal boundary line where the plane of ordinary high tide intersects the shore. According to the Lands Commission, the public's rights in navigable waters are such that the public has the right to walk along Lechuza's property when it is inundated by such waters. Although there is no case law directly on point, we conclude that the public's rights over navigable waters does not extend so far.

Generally speaking, the waters of the Pacific Ocean are navigable waters of the United States. (See 43 U.S.C. § 1301; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 506, 91 Cal.Rptr. 23, 476 P.2d 423; *Moore v. Purse Seine Net* (1941) 18 Cal.2d 835, 836, 118 P.2d 1; *Ventura County Harbor District v. Board of Supervisors* (1930) 211 Cal. 271, 275, 295 P. 6.) Such navigable waters are public ways for the purposes of navigation and transportation of products (Harb. & Nav. Code, §§ 90, 100),[18] and are held in trust by the state for the

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[18] Harbor and Navigation Code, section 90, "Application to navigable waters," provides: "The provisions of this Division [Division 1.5, "Navigable Waters"], in so far as they are not in conflict with the

(continued...)

benefit of the public's recreational use as well, even when the underlying land is privately owned. (*Pacific Gas & Electric Co. v. Superior Court (Sundberg)* (1983) 145 Cal. App.3d 253, 257-258, 193 Cal.Rptr. 336, *overruled on another ground, Hubbard v. Brown* (1990) 50 Cal.3d 189, 197, 266 Cal.Rptr. 491, 785 P.2d 1183.)[19]

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[18] (...continued)
admiralty and maritime jurisdiction and laws of the United States, apply to navigable waters of the United States."

Section 100, "Navigable waters defined," provides: "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and of such transportation. However, the floodwaters of any navigable river, stream, slough, or other watercourse while temporarily flowing above the normal high-water mark over public or private lands outside any established banks of such river, stream, slough, or other watercourse are not navigable waters and nothing in this section shall be construed as permitting trespass on any such lands. For the purposes of this section, 'floodwaters' refers to that elevation of water which occurs at extraordinary times of flood and does not mean the water elevation of ordinary annual or recurring high waters resulting from normal runoff."

[19] "'All navigable waterways are held in trust by the state for the benefit of the public [citation], and the public may use such waters for recreational purposes. [Citations.] Generally, sovereign ownership of navigable waterways extends to the underlying land. [Citation.] Where underlying lands are in private ownership, however, they remain subject to public trust restraints and may not be alienated or used in a manner harmful to trust purposes. [Citations.] The public right of access to navigable waters is of constitutional origin. [Citation.] [¶] Case law applying the constitutional provision confirms the public right of passage, in a lawful manner, over waters usable only for small-craft recreational boating, irrespective of the ownership of the water bed. [Citations.]. . . . [¶] The Constitution and the decisions applying it make it abundantly clear that [a private
(continued...)

However, not all portions of the Pacific Ocean are considered to be navigable. Specifically, tidal waters above the mean high tide line are not navigable waters. (See 43 U.S.C. § 1301(a)(2) ["lands beneath navigable waters" are "all lands permanently or periodically covered by tidal waters *up to but not above the line of mean high tide* and seaward to a line three geographical miles distant from the coast line of each . . . State"] (italics added); see also 33 C.F.R. § 322.2(a) [defining "navigable waters of the United States" for purposes of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403, which requires a permit from the Department of the Army's Corps of Engineers for dredge and fill activities which alter "the course, location, condition or capacity of, . . . the channel of any of the navigable water of the United States") as "[g]enerally, . . . those waters of the United States that are subject to the ebb and flow of the tide shoreward *to the mean high water mark*, and/or presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce"]; *Leslie Salt Co. v. Froehlke* (9th Cir.1978) 578 F.2d 742, 753 [defining navigable waters as extending to "all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state"]; *United States v. Cannon* (D.Delaware 1973) 363 F.Supp. 1045, 1050 ["It is . . . clear . . . that this body of [navigable] water extends in law to its mean high water mark and that it does not extend to areas above

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[19] (...continued)
party's] ownership interest in the land underlying [navigable waters] . . . could not encompass any interest in the waters themselves which would interfere with the public trust. [Citation.] In particular, [the private property owner] does not possess any right to exclude members of the public from entering on and using the [navigable waters] for recreational purposes. [Citations.] On the contrary, plaintiff as a member of the public has a constitutional right to navigate [the navigable waters] in his boat." (*Pacific Gas & Electric Co. v. Superior Court, supra*, 145 Cal.App.3d at pp. 257-258, 193 Cal.Rptr. 336, fns. omitted.)

that mark which are occasionally inundated by waters of the [navigable] Bay. Indeed, . . . 'marshlands and similar areas are . . . considered "navigable in law" . . . only so far as the area is subject to inundation by the mean high waters.' [Citation.] [¶] [T]he applicable rules of law foreclose the government's attempt in this case to extend navigable waters landward of the mean high water mark, . . . "].)

Therefore, we conclude that Judge Hiroshige did not err by concluding that Lechuza's property is not subject to any public navigational or recreational rights landward of the ordinary high tide line as it may exist from time to time.

4. *Judge Hiroshige Erred by Awarding Sanctions Against the Lands Commission for Bringing a Motion for New Trial*

The Lands Commission contends that Judge Hiroshige abused his discretion by denying the Lands Commission's motion for a new trial and imposing sanctions on the Lands Commission for brining the motion for a new trial. Because we reverse, the matter of whether a new trial should have been granted is moot. However, given our conclusion that, in fact, Judge Hiroshige erred as a matter of law in concluding that the southerly boundary was a fixed line based on an average of various surveys, it is apparent that the motion for a new trial was not frivolous, and that the award of sanctions was an abuse of discretion and must be vacated.

5. *Judge Hiroshige Erred by Dismissing MEHOA's Third Cause of Action With Prejudice and by Awarding Sanctions Against MEHOA for Its Dismissal of that Cause of Action*

As already mentioned, the parties agreed that the various causes of action and issues would be tried in stages. It was clearly never contemplated that MEHOA's third cause of action, for declaratory relief as to its rights to enforce its non-express-easement-related rights under the CC&Rs against Lechuza's

lots, would be tried in the initial stage, when the quiet title causes of action were tried. Judge Hiroshige, nonetheless, decided that because trial had commenced within the meaning of Code of Civil Procedure, section 581, subdivision (a)(6), MEHOA no longer had the right to *voluntarily* dismiss its third cause of action. (Code Civ. Proc., § 581(b)(1).) Alternatively, he concluded that MEHOA had abandoned this cause of action. (Code Civ. Proc., § 581(d).)

We conclude that the parties intended that there would be more than one "trial" when they agreed to separate this case into three phases for presentation of evidence and argument which involved discrete, legally unrelated issues and separate questions of fact.

"Blackstone defines 'trial' to be the examination of the matters of fact in issue. [Citation.] . . . 'Trial is a common-law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided.' But the word has often a broader significance, as referring to that final examination and decision of matter[s] of law as well as fact, for which every antecedent step is a preparation, which we commonly denominate 'the trial.'" (*Carpenter v. Winn* (1911) 221 U.S. 533, 538-539 [31 S.Ct. 683, 685, 55 L.Ed. 842].) Hence, commencement of trial on the quiet title actions was not commencement of trial on the remaining issues which were expressly agreed to be tried later. In fact, the parties' stipulation was entitled "Stipulation re: . . . (2) *Separate Trials* of Causes of Action; . . . (italics added), and it provided that, as each trial was concluded, the parties would jointly apply for trial dates for the "Prescriptive Easement Trial," the "Quiet Tittle Trial," and the "Takings Trial."

Furthermore, there is no evidence that MEHOA intended to abandon its third cause of action, so as to justify dismissal under Code of Civil Procedure section 581, subdivision (d). MEHOA's dismissal *without prejudice* indicates an intent to retain a right to such cause of action, not an intent to abandon it.

Therefore, the order dismissing MEHOA's third cause of action with prejudice must be vacated.

6. *Judge Hiroshige Erred by Entering Judgment Against MEHOA Which Established the Southerly Boundary of the MEHOA Easement as a Fixed Line, and Which Established the Northerly Boundary as a Line 25 Feet Above the Fixed Southerly Boundary*

Given our conclusion that the southerly boundary is ambulatory, MEHOA's express easement cannot be defined in terms of a 25 foot measurement above the fixed line established by Judge Hiroshige. In addition, the express easement clearly provides for an alternate northerly boundary depending on the interrelationship of the lines formed by (1) the intersection of the plane of ordinary high tide with the shore and (2) the intersection of a plane five feet above the plane of ordinary high tide with the shore. This issue was not addressed in the judgment, however, it is matter which can be resolved in the quiet title action upon remand.

7. *Lechuza Is Not Entitled to Attorney Fees as the Prevailing Party*

Given our conclusion as to the location of the southerly boundary, Lechuza is no longer the prevailing party, and Judge Hiroshige's order awarding attorney fees to Lechuza must be reversed.

D.

CONCLUSION

The southerly boundary of Lechuza's lots is the mean high tide line, which is an ambulatory line formed by the intersection of the ordinary high tide plane and the shifting shoreline. This is the law in California, and is the result clearly intended by the original grantor of Tract No. 10630. Therefore, Judge Hiroshige erred by fixing the boundary as a stationary line based on the average of a number of surveys, although he did not err by

concluding that the southerly boundary was not the fixed line shown on the 1932 tract map.

The same ambulatory line also marks the point at which any public rights over navigable water ends, because ocean waters which extend above such a line, as a matter of law, are not navigable waters. Therefore Judge Hiroshige did not err by denying the State a recreational easement in favor of the public over Lechuza's private property based on the State's theory that such wave uprush past the mean high tide line constitutes navigable waters.

Because Lechuza did not establish the location of its southerly boundary line and the location of MEHOA's express easement before applying to the Coastal Commission for permits, the Coastal Commission's denial of such permit applications was appropriate, and Judge O'Brien correctly denied Lechuza's petition for a writ of mandate. Furthermore, Judge Hiroshige's subsequent (and not yet final) determination of the location of the boundary line in the quiet title action was not "new evidence" within the meaning of Code of Civil Procedure section 1094.5, subdivision (e), and therefore his remand of the permit applications to the Coastal Commission for reconsideration in light of such "new evidence" was improper.

Because the parties agreed to separate trials of certain causes of action, MEHOA had a right to dismiss its third cause of action without prejudice before the contemplated trial in which that cause of action would be heard, and therefore Judge Hiroshige erred by dismissing MEHOA's third cause of action with prejudice and sanctioning MEHOA for the dismissal.

The recorded CC&Rs provide for an express easement over Lechuza's property running in favor of all of the lots in Tract No. 10630. Therefore, the court must, upon remand, determine the two alternate northerly lines at which the northerly boundary of the express easement lies or may lie.

In view of all of the conclusions which we reach, it cannot be said that Lechuza was the "prevailing party" within the meaning of Civil Code section 1354, subdivision (f). Therefore, the award of attorney's fees in its favor must be vacated.

E.

DISPOSITION

The stay order heretofore issued shall be lifted upon issuance of the remittitur by this court.

The judgment in favor of Lechuza and against MEHOA is reversed. Judge Hiroshige is directed to (1) vacate the order dismissing with prejudice MEHOA's third cause of action, (2) allow MEHOA leave to dismiss it without prejudice, (3) vacate the order awarding attorney fees and sanctions to Lechuza and against MEHOA pursuant to Civil Code section 1354, and (4) conduct further proceedings not inconsistent with the views expressed herein.

As to the "partial judgment" involving issues between Lechuza and the Coastal Commission, the Lands Commission, and the State of California, let a writ of mandate issue directing Judge Hiroshige to:

(1) vacate his order granting Lechuza's motion to remand the permit application matter to the Coastal Commission pursuant to Code of Civil Procedure section 1094.5, subdivision (e);

(2) vacate his order setting the southerly boundary as a fixed line based on an average of various ordinary high tide lines;

(3) vacate his order granting summary adjudication in favor of Lechuza on the issue of takings liability; and

(4) vacate his order awarding sanctions against the Lands Commission for bringing a motion for new trial; and

(5) conduct further proceedings not inconsistent with the views expressed herein.[20]

The Coastal Commission's appeal of the trial court's order suspending the automatic stay under Code of Civil Procedure section 1110b is dismissed as moot.

The Coastal Commission, the Lands Commission, and MEHOA shall recover their costs in connection with MEHOA's appeal from the judgment and the Coastal Commission's and the Lands Commission's writ proceeding.

CERTIFIED FOR PARTIAL PUBLICATION

Croskey, Acting, P.J.

We concur:

KITCHING, J

ALDRICH, JJ.

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[20] Any judgment in the quiet title action must make it clear that the southerly boundary line between Lechuza's property and the public tidelands is an ambulatory line which moves as described in this opinion. However, this does not preclude the parties from obtaining a judicial determination of such line's location as of any specific date or dates, assuming that such a determination would be useful in negotiations between the parties or in connection with Lechuza's future permit applications.

Appendix C-1

Filed 11/26/96

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

LECHUZA VILLAS WEST, a California Limited Partnership, Petitioner/Plaintiff, v. CALIFORNIA COASTAL COMMISSION, a State Agency; STATE OF CALIFORNIA; STATE LANDS COMMISSION, a State agency; the MALIBU-ENCINAL HOMEOWNERS ASSOCIATION; and DOES 2 through 20, inclusive, Respondents/Defendants. RELATED CROSS-ACTIONS.	CASE NO. BC076855 (Complaint assigned to Judge Hiroshige) PARTIAL JUDGMENT GRANTING REMAND PURSUANT TO CODE OF CIVIL PROCEDURE § 1094.5(e) DATE: November 12, 1996 TIME: 9:00 a.m. DEPT.: 54 DISCOVERY CUT-OFF: 12/9/96 MOTION CUT-OFF: 12/24/96 TRIAL DATE: 01/08/97

Appendix C-2

The above-entitled matter came before this Court on November 12, 1996, on Plaintiff LECHUZA VILLAS WEST's Motion for Remand pursuant to Code of Civil Procedure § 1094.5(e). Fred N. Gaines, Esq. and Kevin M. Kemper, Esq. Appeared on behalf of Plaintiff LECHUZA VILLAS WEST. Joseph Barbieri and Clara Slifkin, Deputy Attorneys General, appeared on behalf of Defendants the STATE OF CALIFORNIA and CALIFORNIA COASTAL COMMISSION.

Based upon the papers filed in support of and in opposition to this Motion, and the argument of counsel, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. A peremptory writ shall issue commanding respondent CALIFORNIA COASTAL COMMISSION (hereinafter "Commission") to reconsider the permit applications at issue in the above matter (Coastal Development Permit Application Nos.5-90-839, 5-90-840, 5-90-841, 5-90-842, 5-91-184, 5-91-185, 5-91-186, 5-91-187, 5-91-49, 5-91-50, 5-91-51, 5-91-58, 5-91-59, 5-91-183, 5-91-188, and 5-91-190). The Commission shall reconsider such permit applications based on the evidence contained in the Administrative Record in this matter and the relevant rulings of this Court in this action. Such reconsideration by the Commission shall be completed within sixty (60) days of the date of the Judgment.

2. This judgment shall have no effect on the Court's ruling of October 8, 1996 granting Summary Adjudication as to Plaintiff's Fourth Cause of Action and this Court shall retain jurisdiction over this matter for later trial on the issue of damages.

3. This judgment for a peremptory writ is without prejudice to plaintiff's claim to damages for a taking of property without just compensation commencing on the date that the Commission first denied applications for the use of the subject property. This judgment is for the sole purpose of remanding for reconsideration by the Commission of its decision to deny the Coastal

Development Permit Applications listed in Paragraph 1 above in light of this Court's prior rulings and judgments in this matter, and shall have no res judicata effect as to any issue of law or fact raised in this matter.

4. Counsel shall meet and confer in an effort to agree upon a new trial date in light of this Judgment.

[Material in bold is handwritten.]

5. Nothing in this Judgment shall be considered to limit or control in any way the discretion legally vested in the Commission pursuant to CCP § 1094.5(f).

6. Trial date of January 8, 1997 is advanced to January 27, 1997 [unreadable] as of that date.

DATED: November 26, 1996

/s/ Ernest M. Hiroshige
THE HONORABLE ERNEST M. HIROSHIGE
JUDGE OF THE SUPERIOR COURT

Appendix D-1

Filed 10/8/96

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 10/08/96	DEPT. 54
HONORABLE Ernest Hiroshige Judge	S. McKinney Deputy Clerk
HONORABLE Judge Pro Tem	Electonic Recording Monitor
M. ASTORGA, CRT. AST. Deputy Sheriff	None Reporter

9:00 a.m. BC076855	PLAINTIFF COUNSEL NO APPEARANCES
LECHUZA VILLAS WEST; VS CALIFORNIA COASTAL COMMISSION, ET. AL	DEFENDANT COUNSEL

NATURE OF PROCEEDINGS:

MOTION FOR DEFENDANT, CROSS-DEFENDANT AND CROSS-COMPLAINANT MALIBU-ENCINAL HOME OWNERS ASSOCIATION, INC. FOR AN ORDER TO STRIKE AND IN THE ALTERNATIVE TAX COSTS AND FOR IMPOSITION OF SANCTIONS:

RULING ON SUBMITTED MATTER;

Pursuant to stipulation of counsel, the above motion is continued to OCTOBER 9, 1996, at 8:30 a.m. in Department 54.

In the matter heretofore taken under submission on September 12, 1996, the Court now rules as follows:

As to all three motions substantively address the same issues, the Court issues one tentative ruling determinative of all motions. The Court finds summary adjudication is proper as to one or more claims for damages pursuant to Code of Civil Procedure Section 437c(f)(1).

Plaintiff's motion for summary adjudication of issues is granted as set forth below: The Court adopts the reasoning and authorities of Plaintiff Lechuza Villas West. The Court first finds that the issue of a temporary taking is ripe and properly before this Court. See First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) (holding that a landowner who claims that his/her land has been taken by a land-use regulation may recover damages for the time before it is finally determined that the regulation constitutes a taking of his/her property).

The 5th Amendment provides that private property may not be taken for public use without just compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) articulates the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Where regulation denies all economically beneficial or productive use of land a taking will be found. Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The fifth amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner of economically viable use of his land.").

The court finds that Plaintiff has been temporarily deprived of all economically viable use of the property. (Plaintiff's Separate Statement of Undisputed Facts paragraphs 25, 30, 36, 68). Defendants' arguments to the contrary go to the issue of determining damages, not to the issue of whether a taking has occurred. (See Arick declaration; Mabon declaration). Using the property to develop beachfront homes was the investment backed expectation in the case herein, not using the property for recreational purposes. (See, e.g., Plaintiff's Separate Statement of Undisputed Facts 5-8, 12, 15, 21, 22, 32). The main issue is: "Lechuza did not seek the unfettered development of its property. Lechuza did have an expectation when it purchased the 17 recorded beachfront lots, it would own them. Lechuza also expected that as the owner of this property, it would be able

to do something with it. Instead, the State claimed ownership of the property and denied all use of it." (Reply at 3:3-7).

The Court also finds that its purported legitimated state interests have been rejected by Lucas. Lucas, 112 S.Ct. at 2897-98.

Based on the above, the Court GRANTS the motion for summary adjudication as to the 4th cause of action on the grounds that Plaintiff has been temporarily deprived of all economically viable or productive use of its property, that the State's and Coastal Commission's actions do not substantially advance any legitimate state interest; and Plaintiff's reasonable investment backed expectations have been temporarily destroyed.

As the Court grants Plaintiff's Motion for Summary Adjudication, Defendants' Motion for Summary Judgment is denied. As set forth above, the Court finds that the issue of a temporary taking is properly before it and therefore ripe.

However, as to the 5th cause of action for permanent taking, Defendant's Motion for Summary Adjudication is GRANTED. The Court adopts Defendants' reasoning and authorities as to the issue of a permanent taking and ripeness of that issue only. The Court rejects Plaintiff's argument that the State is not responsible for protecting MEHOA's easement rights, and that the possible infringement of Plaintiff's project into MEHOA's easement is not a proper subject of the Commission's consideration. See Public Resources Code Section 30604(a); Section 30200(a); Section 30210, and Section 30601.5. See also Carsten v. California Coastal Com., 182 Cal.App. 3d 277, 290 (1986) (recognizing that the Coastal Act requires that balancing of competing interest and that the "Public Resources Code section 30210 makes specific reference to . . . private property interests.") (not cited in either parties' papers); Liberty v. California Coastal Com., 113 Cal.App.3d 491, 502 (1980) (not cited in either parties' papers).

Section 30210 specifically refers to the "rights of private property owners." Although neither party cites authority dispositive of the issue, the Court interprets that portion of Section 30601.5 which states that "[W]here the applicant for a coastal development is sought. Thus, as Plaintiff seeks to develop on property to which it cannot claim fee ownership, Plaintiff must address MEHOA's easement claims before this Court can render a decision of the permanent taking issue.

The Court's ruling does not violate the general rule that a trial court judge may not overrule a ruling of another judge as the Court's ruling determines the issue of a temporary taking and not the issue of a permanent taking for which a determination before the Commission of the boundary line pursuant to the Mandate decision is necessary.

Based on the above-rulings, Defendants' motion for judgment on the pleadings is essentially moot.

All evidentiary objections are overruled.

Defendants' Request for Judicial Notice is granted.

Appendix E-1

Filed 6/11/96

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COUNTY OF LOS ANGELES

LECHUZA VILLAS WEST, a California Limited Partnership, Petitioner/Plaintiff, v. CALIFORNIA COASTAL COMMISSION, a State Agency; STATE OF CALIFORNIA; STATE LANDS COMMISSION, a State agency; the MALIBU-ENCINAL HOMEOWNERS ASSOCIATION; and DOES 2 through 20, inclusive, Respondents/Defendants. RELATED CROSS-ACTIONS.	CASE NO. BC076855 (Complaint assigned to Judge Hiroshige) ~~[Second Proposed]~~ STATEMENT OF DECISION TRIAL DATE: October 18, 1995 DEPT.: 54

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This matter came on regularly for bench trial in Department 54 of the above-entitled Court, the Honorable Ernest M. Hiroshige, Judge, Presiding. Fred N. Gaines and L. Elizabeth Strahlstrom of Reznik & Reznik, A Law Corporation, and Sherman L. Stacey appeared on behalf of Plaintiff LECHUZA VILLAS WEST, L.P. ("Plaintiff"). Dennis M. Egan and Joseph Barbieri, Deputy Attorneys General, appeared on behalf of Defendants and Cross-Complainants THE STATE OF CALIFORNIA and the STATE LANDS COMMISSION (the "STATE"). Terence M. Sternberg, of Vittal & Sternberg, appeared on behalf of Defendant and Cross-Complainant MALIBU-ENCINAL HOMEOWNERS ASSOCIATION ("MEHOA").[1] Trial commenced on October 18, 1995 and concluded on December 11, 1995.

By stipulation the parties agreed to a bifurcated trial. This Statement of Decision involves the first phase of the bifurcated trial and constitutes a final decision as to the Sixth, Seventh, and Eighth Causes of Action of Plaintiff's First Amended Complaint, the entirety of the STATE's cross-complaint (the First, Second, Third and Fourth Causes of Action as contained therein) and the entirey of MEHOA's Cross-Complaint (the First, Second and third Causes of Action as contained). The Third, Fourth and Fifth Causes of Action of Plaintiff's First Amended Complaint remain before this Court for later trial.

I

SUMMARY OF THE ISSUES TRIED

This matter involved the determination of the location of the southern or seaward boundary of 19 beachfront lots, Lots 141-

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[1] While the above-referenced parties were the only parties to appear at trial, all named parties have stipulated to be bound by the outcome of this action.

156 in Tract No. 10630 as recorded in Book 181, Pages 6-11 of Maps in the official records of the County Recorder of Los Angeles County ("the subject property"). This matter also involved the STATE'S claim of a public navigational servitude over all portions of the subject property covered from time to time by the ebb and flow of the ocean tide. Finally, this action involved MEHOA's claim of an express easement over the subject property based on language found in the Covenants, Conditions and Restrictions ("CC&Rs") affecting Tract No. 10630.

II

DECISION

A. The Court Finds That the Location of the Seaward Boundary of Plaintiff's Property Is the Average Location of the Surveyed Mean High Tide Lines on the Subject Property

During trial proceedings and on the record the Court has previously indicated the basis by which the Court has found that the case of *People v. William Kent Estate Co.*, 242 Cal.App.2d 156 (1966) (hereafter the "*Kent Estate* Case") governs the decision of this Court in determining the seaward boundaries in question. Both the *County of Lake v. Smith*, 228 Cal.App.3d 214 (1991) and *Littoral Development v. SF Bay Conservation & Dev.*, 24 Cal.App.4th 1050 (1994) quote *Kent Estate* with approval.

The *Kent Estate* case found that under Civil Code Section 830 that as to the "tide-water" that the "ordinary high-water mark" is the seaward boundary.

Kent Estate held that on beaches subject to a fluctuating mean high tide line due to annual erosion and accretion, that the ordinary high water mark will constitute an "average" fixed location of the mean high tide line which then serves as the seaward boundary between private property and public tidelands. The beach in *Kent Estate* had an annual fluctuation of as much

as 80 feet and the Lechuza Beach fluctuation is as much as 110 feet.

The STATE'S position, ignoring the Kent Estate Case's almost 30-year precedent, argues that a seaward boundary on a fluctuating beach moves constantly with the ebb and flow of the tide. The STATE'S position violates two tideland principles: (1) a migration of the seaward boundary between public tidelines and private property in accordance with the landward and seaward movement of the mean high tide line occurs only when the changes are gradual and imperceptible, due to the natural accretion and deliction of the sand due to gradual wave action; and (2) the seaward boundary does not change as a result of "avulsion" or the sudden or violent action of the elements.

The Court adopts the reasoning and authorities contained in Plaintiff's Offer of Proof in Support of Determination of a Fixed Seaward Boundary, filed November 13, 1995, in making the ruling.

The Court finds that the Plaintiff has carried its burden of establishing an average fixed boundary as to the 19 lots in question in accordance with generally accepted principles of oceanography, geology, engineering, surveying and statistics to justify the Court's finding that the average mean high tide line as found in Table 2 of Trial Exhibit 321 determines the southern or seaward boundary of the lots in question. Attached hereto as Exhibit "A" is a copy of Table 2 from Trial Exhibit 321. Attached hereto as Exhibit "B" is a map showing the location of the boundary as described in Exhibit "A."

The Court is dismayed that the STATE has apparently ignored applicability of the Kent Estate Case to these proceedings when it has been good law for some 30 years. The STATE has taken the position that *Kent Estate* is either wrongly decided or otherwise inapplicable to beachfront development cases and puts forward no alternative basis to interpret the impact of the Kent Estate Case on future seaward boundary disputes.

Therefore the Court feels compelled to attempt to remediate future disputes regarding seaward boundaries by ruling as follows: that in the future, when property owners of coastal beachfront property seek to determine their seaward boundary in circumstances that make the analysis of the Kent Estate Case applicable the property owner will:

1. Commission surveys using generally acceptable principles of oceanography, geology, engineering, surveying and statistics to determine the average mean high tide line for the previous 2 years;

2. The data for the computation shall encompass at least one survey for each previous season (the previous winter, spring, summer and fall); and

3. If the STATE (or an appropriate governmental agency) wishes to contest the property owner's boundary determination then the STATE may maintain its own surveys using the same methodology and present its contrary position; and/or challenge the validity of the data and methodology of the property owner's position.

B. The Court Finds That the Subject Property Is Not Subject to a Navigational Easement Landward of the Seaward Boundary

The Court finds that the subject property is not subject to a public navigational or recreational easement landward of the seaward boun , (as such boundary is shown on Exhibit "B").

The case of *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484 (1982) precludes the STATE'S claim of a public navigational servitude. In *Aptos*, the court disposed of the State's claim that the public's right to use private beachfront property extended to "that point reached by the highest annual swells of the sea" such that the beach up to the highest high water mark was burdened with a "public servitude." The court

held that the public's rights do not extend to the area beyond the public tideland/private property boundary.

The STATE has asserted a claim for a "public recreational easement" or "navigational servitude" which would allow the public to use any portion of the subject property which is touched by tidal water even if only during high tides or storm conditions. The STATE has failed to meet its burden of proof regarding this claim.

In addition, the STATE has failed to prove any implied dedication of an easement for recreational use over the subject property under the doctrine enunciated in *Goin v. City of Santa Cruz*, 2 Cal.3d 29 (1970).

C. The Court Finds That MEHOA'S Express Easement Is Measured 25 Feet Landward from the Southerly Boundary of the Subject Property

The Court rejects MEHOA's claim that its express easement is located by measuring twenty-five (25) feet landward from the location of the mean high tide line as it moves from day to day. The Court finds that the express easement contained in the CC&Rs for the subject property (Trial Exhibit No. 542) is measured 25 feet landward from the southerly boundary of the subject property as established by this Decision. A map showing the location of such easement in attached hereto as Exhibit "B." MEHOA has failed to meet its burden of proof as to all other claims set forth in MEHOA's Cross-Complaint.

III

CONCLUSION

As detailed above, this Court finds that Plaintiff has carried its burden of proving ownership of the subject property to the seaward boundary as established by this Court. The Court also finds that the subject property is not burdened with a public navigational servitude landward of the location of the seaward boundary. Finally, the Court determines that MEHOA's express

easement pursuant to the CC&R's for Tract No. 10630 is measured 25 feet landward from the southerly boundary of the subject property.

This Court will retain jurisdiction over this matter for the purpose of determining the claims yet to be tried, and as to all other matters the Court may appropriately determine.

DATED Jun 11 1996, 1996

/s/ERNEST M HIROSHIGE
ERNEST M. HIROSHIGE
Judge of the Superior Court

Appendix F-1

Dated 1/14/9[3]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 W. BROADWAY, STE. 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

Filed:	7/9/92
49th Day:	8/27/92
180th Day:	1/5/93
Staff:	JLA-LB
Staff Report:	10/23/92
Hearing Date:	1/14/9[3]
Commission Action:	

STAFF REPORT: REGULAR CALENDAR

APPLICATION NO.: Proposal 1: 5-91-049, 5-91-050, 5-91-051, 5-91-058, 5-91-059, 5-91-183, 5-91-188, 5-91-190

Proposal 2: 5-90-839, 5-90-840, 5-90-841, 5-90-842, 5-91-184, 5-91-185, 5-91-186, 5-91-187

APPLICANT: Lechuza Villas West

AGENT: Norman Haynie

PROJECT LOCATION: 31728, 31732, 31736, 31744, 31752, 31760, 31776, 31792, 31800, 31816, 31822, & 31808 Sea Level Drive, City of Malibu, Los Angeles County

PROJECT DESCRIPTIONS: The applicant is proposing two separate development schemes:

Appendix F-2

Proposal 1: 5-91-049 (Lot 142), 5-91-050 (Lot 154), 5-91-051 (Lot 144), 5-91-058 (Lot 143), 5-91-059 (Lot 153), 5-91-183 (Lot 141), 5-91-188 (Lot 152), 5-91-190 (Lot 145)

Construction of a 314 foot long extension of eastern Sea Level Drive and a 148 foot extension of western Sea Level Drive both ending in a cul-de-sac, a 349 foot long rock revetment along the eastern extension of Sea Level Drive, a 188 foot long rock revetment along the western extension of Sea Level Drive, two 60 foot drive-way extensions off the end of the cul-de-sac to lots 145 and 152, and eight two story, 35 foot high, single family residences with septic system. Total grading for the proposed project is 10,674 cubic yards (10,659 cu. yds fill, 15 cu. yds cut) for the construction of the road.

Proposal 2: 5-90-939 (Lot 144), 5-90-940 (Lot 148), 5-90-841 (Lot 151), 5-90-842 (Lot 154), 5-91-184 (Lot 146), 5-91-185 (Lot 148), 5-91-186 (Lot 150), 5-91-187 (Lot 151)

Construction of a 1,200 foot long extension of Sea Level Drive connecting eastern and western Sea Level Drive, a 985 foot long rock revetment and eight two story, 35 foot high single family residences with septic systems. Total grading for the proposed project is 15,000 cubic yards (14,985 cu. yd. fill, 15 cu. yds. cut) yards

Lot areas:

7,800 sq. ft. (lot 141)
7,863 sq. ft. (lot 142)
7,865 sq. ft. (lot 143)
8,095 sq. ft. (lot 144)
7,900 sq. ft. (lot 145)
8,100 sq. ft. (lot 146)

	8,676 sq. ft. (lot 148) 9,300 sq. ft. (lot 150) 9,058 sq. ft. (lot 151) 9,100 sq. ft. (lot 152) 9,171 sq. ft. (lot 153) 9,151 sq. ft. (lot 154)
Building coverages:	2,150 sq. ft. (lot 141) 1,831 sq. ft. (lot 142) 2,095 sq. ft. (lot 143) 1,650 sq. ft. (lot 144) 2,200 sq. ft. (lot 145) 1,677 sq. ft. (lot 146) 1,491 sq. ft. (lot 148) 2,365 sq. ft. (lot 150) 2,057 sq. ft. (lot 151) 2,089 sq. ft. (lot 152) 2,095 sq. ft. (lot 153) 1,596 sq. ft. (lot 154)
Pavement coverage:	600 sq. ft. (all lots)
Parking spaces:	2 (all lots)
Plan designation:	Residential IIIB (4-6 du/acre)
Ht abv nat grade:	35 feet (all residences)
LOCAL APPROVALS RECEIVED:	Los Angeles County Department of Regional Planning "Approval in Concept," Los Angeles County Department of Health Services "Septic System Approval".

SUBSTANTIVE FILE DOCUMENTS:

1. Certified Malibu/Santa Monica Mountains Land Use Plan, County of Los Angeles, 12/11/86.

2. Malibu Wastewater Management Study, Phillip Williams & Associates, Peter Warshall & Associates, March 1992.

3. County of Los Angeles Fire Department Fire Code Standard No. 10.207 (A).

4. City of Malibu, Ordinance No. 68U, 70, and 76U.

5. Shalowitz, *Shore and Sea Boundaries*, Vols. I and II (1962, 1964).

6. Graber & Thompson, *The Issues and Problems of Defining Property Boundaries of Tidal Waters in California*, California's Batter Coast (California Coastal Commission, 1985).

7. Hale, *Modeling the Ocean Shoreline*, Shore and Beach (Vol. 43, No. 2, October 1975).

8. Johnson, *The Significance of Seasonal Beach Changes in Tidal Boundaries*, Shore and Beach (Vol. 39, No. 1, April 1971).

9. Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 No. Carolina L.Rev. 185 (1974).

10. Nunez, *Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem*, San Diego L.Rev. 447 (1969).

11. Shepard, *Beach Cycles in Southern California*, Beach Erosion Board Technical Memorandum No. 20 (U.S. Army Corps of Engineers, 1950).

12. Thompson, *Seasonal Orientation of California Beaches*, Shore and Beach (Vol. 55, Nos. 3-4, July 1987).

13. Coastal Permit Applications: 5-87-762 & 5-87-762R (Monkarsh); 5-86-412 (Liberman); P-78-2824

(Beyer); P-79-5359 & A-259-79 (Gershwin); P-78-2733 (Apollo); P-78-4308 & 5-82-728 (Gershonoff); 5-84-295 (Beyer); 5-87-1028 (Liberman); 5-88-578 (House); 5-89-012 (Liberman); 5-90-302 (Gershonoff); 5-90-807 (Boeckman); and 5-91-0 (Moore).

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends *Denial* of the proposed development based on substantial evidence that indicates that the mean high tide line, and thus the boundary between public and private lands, has been landward of the proposed projects; that the project proposed is not consistent with the public trust in such lands; that the project would obstruct a public navigational easement with a use inconsistent with that easement; that approval of the project would prejudice the preparation of a LCP by the City of Malibu; and that the project would be inconsistent with the shoreline protection, hazards, access, water quality, sensitive resources, recreation and visual policies of the Coastal Act.

STAFF NOTE:

Permit applications 5-91-839, 5-90-840, 5-91-841, 5-91-842, 5-91-049, 5-91-050, 5-91-051, 5-91-058, 5-91-059 were remanded back to the Commission for public hearing by Judge Waddington of the Los Angeles County Superior Court. Therefore, these permit applications have been incorporated into this revised staff report. The staff previously prepared separate staff reports for the two different proposals. Because most of the issues raised by the two proposals are the same, and because of the length of the presentation, staff has combined into one report the discussion of both projects. However, for purposes of voting on the projects it may be preferable to vote separately on each.

I. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following resolution:

A. Denial

The Commission hereby *denies* a permit for the proposed development on the grounds that it would not be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976 and would prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of the Coastal Act.

II. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Project Description

The applicant is proposing two separate development schemes. The first proposal Involves the construction of a 314 foot extension of eastern Sea Level Drive and a 148 foot extension of western Sea Level Drive both ending in cul-de-sacs, a 349 foot long rock revetment along the eastern extension of Sea Level Drive, a 188 foot long rock revetment along the western extension of Sea Level Drive, two 60 foot driveway extensions supported on caissons off both ends of the two cul-de-sacs to lots 145 and 152, and eight 35 foot high, single family residences (3,880 sq. ft., 3,522 sq. ft., 4,736 sq. ft., 3,402 sq. ft., 3,092 sq. ft., 4,530 sq. ft., 3,760 sq. ft., and 5,002 sq. ft.) with septic systems (Exhibits 1, 2, 3, 4, 9, 10, and 15-19.) The applicants are proposing a total of 10,674 cubic yards of grading consisting of 6,120 cu. yds. of fill for the construction eastern Sea Level drive and 4,539 cu. yds. fill and 15 cu. yds. cut for construction of western Sea Level Drive.

The second proposal involves the construction of a 1,200 foot extension of Sea Level Drive connecting eastern and western Sea Level Drive, a 985 foot long rock revetment and eight two

story, 35 foot high, single family residences (3,415 sq. ft., 2,982 sq. ft., 4,665 sq. ft., 4,347 sq. ft., 4,530 sq. ft., 3,462 sq. ft., 4,347 sq. ft., 3,092 sq. ft.) with septic systems. (Exhibits 1, 2, 3, 5, 6-8, and 11-14.) The applicants are proposing 15,000 cubic yards of grading (14,985 cu. yds fill, 15 cu. yds cut) for the construction of the Sea Level Drive extension.

Although there are 16 permit applications for 8 residences under proposal 1 cul-de-sac design) and 8 under proposal 2 (design connecting east and west Sea Level Drive), only 6 can actually be constructed under proposal 2 because there are two permit applications per lot on lots 148 and 151 (Exhibit 2).

The proposed projects are located on Lechuza Beach south of Sea Level Drive next to a private locked gate community in the new City of Malibu. The proposed eastern and western extensions of Sea Level Drive including the cul-de-sacs, revetment and driveway extension will stretch across 10 lots and will occupy approximately 45,000 square feet of sandy beach area below an eroding coastal bluff. The proposed road and revetment will extend 70 - 90 feet on to the beach from the bluff face. The proposed road extension and seawall for Proposal 2 will stretch across 16 lots and will occupy approximately 80,000 sq. ft. of open sandy beach. For both proposals the residences are sited over the revetment and will extend as far as 100 feet ± from the coastal bluff face onto sandy beach. The proposed septic system will be constructed in the road right-of-way and the leach field will be under the asphalt pavement.

The proposed building sites are parcels created in the early 1930's and are designated as residential IIIB (4-6 du/acre) in the Certified Malibu/Santa Monica Mountains Land Use Plan. (The area is now within the new City of Malibu which has not as yet completed its general plan and Local Coastal Program.) As previously mentioned, the site is located adjacent to an existing developed private community west of Broad Beach and Lechuza Point. The beach lots in this community, however, are largely undeveloped. The eastern 23 of the 34 lots located on the sand

below Sea Level Drive have been deed restricted for the private recreational use of residents of the locked gate community. None of the lots currently have road access. A road and one structure did exist on this beach in 1930's but were washed away in heavy storms in the late 1930's. The proposed project is located on the undeveloped western portion of the beach where Sea Level Drive presently terminates. Four structures have been built in the sand on the far eastern portion of the beach (pre-coastal Commission) and the Commission has recently approved three infill houses in this area, 5-89-012 (Liberman), 540-302 (Gershonoff) and 5-90-807 (Boeckman) where Sea Level Drive currently exists. Regarding Lechuza Beach, the Certified LUP, Policy 56-4 states that "*public purchase of beach and accessway properties is an objective in this area.*" This beach is easily accessed from the public beach to the West (El Matador). In addition, the LUP designates this beach, the rocky shore area, bluff area and the off-shore kelp beds as Environmentally Sensitive Habitat Area (ESHA).

On January 10, 1991 the Commission denied four projects on this beach [5-90-839, 5-90-840, 5-90-841 and 5-90-842 (Lechuza Villas West)]. These projects involved the construction of a 1,200 foot long extension of Sea Level Drive, construction of a 985 foot long rock revetment and construction of four single family residences. The revetment stretched across the entire beach and covered 16 vacant lots. The configuration of the road and revetment for these denied projects are identical to the proposed project identified in this report as proposal 2. This set of applications involved proposed homes on lots 144, 148, 151 and 154. On April 11, 1991 the Commission denied another four permit applications on this beach; 5-91-049, 5-91-050, 5-91-051, 5-91-058, and 5-91-059. These projects involved the construction of the eastern and western extensions of Sea Level Drive in the same configuration and design, as proposal 1 with the exception of the 60 foot driveway extension to lot 145 and 152. Five single family residences were proposed an lots 142, 143, 144, 153 and 154.

On February 26, 1991 the applicant submitted the three subject permit applications 5-91-183, 5-91-188, and 5-91-190 along with five other permit applications (5-91-184, 5-91-185, 5-91-186, 5-91-187 and 5-91-189) for single family residences on the subject beach. The applicant proposed a road and revetment design identical to the project denied on April 11, 1991 (cul-de-sac design) with the exception of two 60 foot long driveway extensions supported on caissons, to lots 145 and 152. Four of the five permit applications proposed development on parcels which were located between the terminus of the proposed eastern and western extension of Sea Level Drive and the proposed revetments. This would place residential development on parcels with no road access or revetment protection under the cul-de-sac design proposal. To access these parcels Sea Level Drive and the road revetment would have to be extended across the entire beach, which is identical to the road and revetment design proposal denied by the Commission on January 10, 1991, under permit application numbers 5-90-839, 5-90-840, 5-90-841 and 5-90-842 (Lechuza Villas). The applicant requested that staff not agendize these five applications and the applicant's agent led staff to believe that these projects would be withdrawn. Therefore, staff went forward with only three of the eight projects submitted. However, the applicant's agent never submitted a written withdrawal request and later the applicants indicated they wished to go forward with all eight of the proposed projects. Because the Commission opened and continued the hearing on the three subject permit applications the five other permit applications (5-91-184, 185, 186, 187 and 189) had to be heard and acted an separately and presented under a separate staff reports. On December 10, 1991 the Commission denied permit applications for the two separate design proposals under permit applications 5-91-153 through 188 and 190. The applicant withdrew application 5-91-189 just prior to the hearing.

On July 9, 1992, the Commission granted the applicant's request to reconsider the above referenced permit applications (denied

on December 10, 1991) in light of the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___, 112 S.Ct. 2886. On August 13, 1992 the Commission opened and continued the hearing on these permit applications to allow Commission staff adequate time to obtain additional information, review and conduct site specific studies and address in more detail the environmental impacts of the proposed projects; and to seek information regarding the nature of the applicant's ownership interest in the property, what the purchase price and terms of purchase were and the particulars of offers to purchase the property by private and other interests. In particular, staff sought information regarding the extent of the applicant's property interest and whether any public rights exist in the property with which the projects would unlawfully interfere. Therefore, the subject permits are now again before the Commission for consideration.

In November 1992, the Los Angeles County Superior Court remanded permit applications 5-91-839, 5-90-840, 5-91-841, 5-91-842, 5-91-049, 5-91-050, 5-91-051, 5-91-058, 5-91-059 back to the Commission for review. The proposed development scheme under permit applications 5-90-839, 5-90-840, 5-90-841 and 5-90-842 is identical to proposal 1 with residential development proposed on lots 144, 148, 151 and 154. The proposed development scheme under 5-91-049, 5-91-050, 5-91-051, 5-91-058 and 5-91-059 is identical to proposal 2 with residential development proposed on lots 142, 143, 144, 153, and 154.

On October 26, 1992 the applicant submitted an entirely new vertical caisson seawall design scenario in the cul-de-sac configuration. On November 4, 1992 the applicant submitted engineered plans for a vertical caisson design plan across the entire beach connecting east and west Sea Level Drive. In the case of the cul-de-sac design the proposed vertical seawall extends further down the beach eliminating the two 60 foot long driveways supported on caissons to lots 145 and 152 off the ends

of the two cul-de-sacs. Both vertical seawall designs would be sited some 30 feet landward of the toe of the rock revetment design. The proposed residences are sited in the same location as the original plan. A vertical wall design had been mentioned by the applicant several months ago, and was mentioned by staff in the original staff report on the permit application back in December of 1991. Commission staff believes that the proposed change from a rock rubble revetment to a vertical caisson seawall represents a significant change to the proposed project which requires local discretionary approvals. (Section 13052.) (See discussion under mechanisms of impact below.) These designs have not received local discretionary approvals.[1] In addition, the Commission granted reconsideration and the Court remanded the permit applications as originally proposed with rock revetments. Therefore, at this hearing the Commission is only considering the original proposed project designs which were granted reconsideration and remanded to the Commission. This does not preclude the applicant from submitting a proper proposal for a vertical wall design at a future time. The applicant requested that his "Summary and Clarification of Applicant's Proposed Project be given to the Commission as part of this report. It is attached as Exhibits 28-31.

B. Shoreline Development—Access

1. Public v. Private Land Ownership

Sections 30210 and 30211 protect the public's right to access consistent with the California Constitution, and provide that development shall not interfere with the public's right of access to the sea:

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[1] It should be noted, as discussed in greater detail below, that during the pendency of this set of applications the City of Malibu, in which these proposed projects are located, incorporated. Thus, the appropriate local approval would be that of the City, not the County.

Section 30210:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

In addition, Section 30601.5 requires the Commission to assess an applicant's ownership interest, or other legal right, interest or entitlement to use the property for the proposed development. The applicant has the burden of proof on this issue. This, combined with the issues raised by the *Lucas* case, prompted staff to request additional information on the subject. A critical aspect of the proposed project is the location of the project relative to public and private lands, as determined by the tideland/upland boundary. Under Civil Code section 830, the boundary between uplands and publicly-owned tidelands is the ordinary high water mark . The California Supreme Court has defined the ordinary high water mark in tidal areas as the mean high tide line (MHTL).

The MHTL consists of a vertical and horizontal element.[2] The vertical element is the mean elevation of all high tides at the location in question over an 18.6 year period. The horizontal element is the topography of the shoreline. The MHTL is defined by the intersection of the plane of mean high tide with the shoreline profile. Where the shore is made of rock or is not subject to wind and wave action, the elevation of mean high tide will consistently intersect the shore at the same place. However, where the shore is composed of sand, the shoreline profile constantly changes as the sand either builds up or erodes under the action of the waves. In addition, the beach profile can change considerably from summer to winter along a sandy beach. During the winter, the beach sand often is eroded due to high strong surf conditions and moved to offshore bars resulting in a landward migration of the MHTL. In the summer months, the sand returns to the beach due to the more gentle summer wave regime and the MHTL moves seaward. With each change in slope or elevation of the beach the MHTL also changes. (A

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[2] This discussion of the technical and legal issues bearing on the location of the boundary between uplands and tidelands is based in large part on the following documents on file with the Commission: Shalowitz, Shore and Sea Boundaries, Vols. I and II (1962, 1964); Graber & Thompson, *The Issues and Problems of Defining Property Boundaries on Tidal Waters in California*, California's Battered Coast (California Coastal Commission, 1985); Hale, *Modeling the Ocean Shoreline*, Shore and Beach (Vol. 43, No. 2, October 1975); Johnson, *The Significance of Seasonal Beach Changes in Tidal Boundaries*, Shore and Beach (Vol. 39, No. 1, April 1971); Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 No. Carolina L. Rev. 185 (1974); Nunez, *Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem*, 6 San Diego L.Rev. 447 (1969); Shepard, *Beach Cycles in Southern California*, Beach Erosion Board Technical Memorandum No. 20 (U.S. Army Corps of Engineers, 1950); Thompson, *Seasonal Orientation of California Beaches*, Shore and Beach (Vol. 55, Nos. 3-4, July 1987).

simplified illustration of this process is contained in Exhibit 20.) The result is a continually changing MHTL.

Notwithstanding Civil Code section 830 and case law which calls for the public-private boundary to be wherever the MHTL is, the applicant proposes a boundary line fixed at some form of average or mean between the most landward and seaward MHTL locations. This approach is inconsistent with the Civil Code and case law. Also, for purposes of seeking an average, there is no reasonable or scientific basis for selecting among the infinite number of transient locations of the MHTL on the shifting topography of a sandy beach. Nor is there a scientifically-recognized time period over which to collect this given number of MHTL locations. The changes are random, unpredictable, and not subject to calculation of a dependable average. This is in contrast to the astronomical variants that determine tide height, which are fully played out over a tidal epoch of 18.6 years, and therefore permit the calculation of a reliable average for tide height.

Section 830 states that ". . . the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark" and *City of Oakland* v. *Buteau* (1919) 180 Cal. 83, 87, holds that ". . . a boundary marked by a water line is a shifting boundary, going landward with erosion and waterward with accretion." Thus, any attempt at fixing an "average" line would create a different boundary between public and private lands than that called for by the Civil Code and case law. For example, when the MHTL moved landward of this "average" MHTL the public would be deprived of its ownership of tidelands, which are owned under a common law trust for the public's benefit (see *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515), and which are accorded special additional protection under article X, sections 3 and 4, of the California Constitution. On the other hand, when the MHTL moved seaward of this "average" MHTL, the private owner would be deprived of property rights granted by the Code, including access to the water.

Furthermore, this so-called average could only be established by an essentially arbitrary process. To create an average, a given number of MHTL locations would have to be selected. The problem is that there are an infinite number of such locations as the MHTL changes constantly on a sandy beach. Second, a time period for the collection of these locations would have to be established. This would also defy rational selection. Unlike the tides, where all of the various possible combinations of astronomical influences on tide height will exert their affect during a tidal epoch of 18.6 years, the variables that cause changes in the profile of a sandy beach are not subject to any such scientifically predictable cyclical limitations. There are far more variables over a period of time which could involve weather patterns over a century or more, and which, even then, might not yield a dependable average. As a consequence, any period selected would either be arbitrarily short or impracticably long.

In the State of Florida, the boundary issues along sandy beaches has been resolved by choosing the most landward extent of the MHTL as the boundary between public and private lands. (*Internal Improvement Fund* v. *Ocean Hotels* (1974) 40 Fla. Supp. 26, 33.)

Another approach, which finds support in the decisions of the California Supreme court (see e.g., *City of Oakland* v. *Buteau*, *supra*), is to treat the boundary as an ambulatory one, which moves with changes in the MHTL. An ambulatory line avoids the problems associated with averaging and protects the rights that public and private owners have under the Civil Code. With an ambulatory boundary, there is an area between the most landward identified MHTL and the most seaward identified MHTL in which the rights of both the public and the private owner are adapted to reflect the realities of a shifting boundary line. For example, though a private owner could exercise some property rights in this area, such as the right to exclude others, when the MHTL was seaward, he could not build in this area

because it would prevent the public from enjoying its rights when the MHTL moved to its more landward position.

This question of the location of the public-private boundary along sandy ocean beaches has not been definitely settled by the California courts. The Commission is not a court of law and cannot establish the boundary between public and private lands. This is the proper domain of a court of law in a quiet title action. What the Commission can do is determine whether the applicant has met his burden of demonstrating (1) a sufficient interest in the property such that he is entitled to build the project and (2) that his project will not interfere with public property interests involving the sea and the shore and the right to use and enjoy them both.

With this objective in mind and given the need, under *Lucas*, to determine the applicant's interest in the property at issue and the impact his project might have on public rights, the Commission and the applicant undertook to gather additional information on the subject. As discussed below, the staff has reviewed reports which demonstrate the MHTL has been landward of the project.

On behalf of the Commission, the Attorney General employed Mr. Francois Uzes, an expert in the field of boundary studies and surveying, to identify mean high tide lines on Lechuza Beach in relation to the proposed project. Mr. Uzes states in his report that:

> "The MHTL is most accurately located by survey, although even the most correct survey only locates the line at a given point of time . . . it has no continuing relevance . . . once the line has moved as a result of natural shoreline processes. Thus, no matter how carefully and accurately a survey may have been performed, it is soon outdated . . . . Nor can it be relied on in a broader sense to define the most landward limit of the MHTL position in the winter, unless it was conducted when the MHTL was in that position. If accurate surveys of the most landward position

> of the MHTL are not available, resort must be made to other forms of evidence such as aerial photographs. An aerial photography taken in the winter offers better evidence of the landward MHTL position that do actual surveys performed when the MHTL is located further seaward."

Mr. Uzes studied 29 aerial photographs of Lechuza Beach taken between 1946 and 1989 in order to estimate the locations of the MHTLs on this beach. Seven of the photographs were found to have a combination of tide and beach wash zone which indicated the MHTL's were landward of portions of the proposed seawall and residences. Therefore, the conclusion of this study is "that the position of the MHTL is at times landward of portions of the proposed seawall and residences." (See Exhibits 21, 22.)

The applicant has submitted an engineering study, prepared by David Weiss, which also addresses the question of the location of mean high tide lines in relation to the proposed projects. The report identifies eight surveyed mean high tide lines. Three are actual surveys of this beach on July 23, 1932, August 1951 and April 1990. The other five lines are extrapolated from other surveyed tide lines (not dated) along Sea Level Drive to the east of this section of beach. As explained above, the date of the survey is critical in determining the most landward mean high tide lines since the winter lines are usually located farther landward than summer lines. Although staff requested information on the dates and locations for the surveys used for the extrapolated mean high tide lines, the applicant has not provided staff with that information. The applicant's consultant did prepare a depiction of a statistical average of all the measured mean high tide lines. (The underlying statistical analysis was requested but not provided to staff.) This line is approximately 15 feet landward of the 1932 surveyed line and approximately 8 feet seaward of the recorded 1990 mean high tide line. (Exhibit 23) A statistical analysis was also done which is claimed to show with a 90 percent probability where mean high

tide lines will fall 95 percent and 98 percent of the time. (Exhibit 24.) The maps indicate that the most landward boundary of the 95 percent zone is seaward of the proposed project and the 98 percent zone's most landward boundary is on the building "stringline." However, if none of the surveys reflect a winter beach condition, these maps show at best, estimates for a MHTL range, and not the full extent of MHTL locations which could be expected throughout a year.

The applicant's consultants believe that based on a statistical analysis of the 8 surveyed lines (5 of which are unidentified as to time of survey and 3 of which are summer or spring surveys), it is reasonable to assume the location of the majority of MHTLs will be seaward of the project. They concede, however, that the zone of their predicted range of 98% of MHTLs will touch the boundary of the project and that 1% of the time the MHTL will be landward of the project.

The Commission is, therefore, presented with evidence from Mr. Uzes that on at least seven occasions—in 1946, 1978, 1984, 1986, twice in 1987, and in 1988—the MHTL was landward of the project. The applicant's evidence tends to corroborate these MHTLs because it projects a MHTL which will at times border or move landward of the project.

In addition to these reports, the Commission has before it a letter from the Executive Officer of the State Lands Commission. This letter states that upon review of the reports of the applicant and Mr. Uzes, "Unless and until further study indicates otherwise, it is the position of this agency that any activity on this land will require a permit from this agency." The letter also indicates that "residential use is not consistent with the Public Trust and construction of residential facilities would not be permitted on land determined to be in State sovereign ownership." (Exhibit 25)

The existence of evidence that the MHTL has been landward of portions of the project, together with the State Lands Commis-

sion position that this project would require a State Lands permit, indicates that the public has a claim to areas in which the applicant proposes to place his project. Such a claim exists regardless of whether the boundary between public and private lands is ambulatory or is fixed at the most landward extent of the MHTL. Indeed, pursuant to Public Resources Code sections 30401 and 30416, because the Lands Commission is the agency entrusted with management of all state lands including tide and submerged lands, the Commission believes it is compelled to respect the Lands Commission's assertion of jurisdiction over this area and to avoid issuing a permit for a project which the Lands Commission has indicated could not be permitted by it. As a result, the Commission finds the applicant has failed to demonstrate that he has sufficient ownership interest in the property as required by Public Resources Code section 30601.5, and has failed to meet his burden of demonstrating his project would be consistent with Public Resources Code sections 30211, 30221 and Article X, section 4 of the California Constitution by not interfering with public access to the sea. The Commission's determination on these grounds alone is a basis for denial.

2. Public Navigational Easement

In California and numerous other states, the public has a right to navigate and make other recreational uses (swimming, bathing, fishing, wading) in and upon the Waters of a waterbody that is capable of being navigated by recreational craft such as canoes, kayaks, surfboards, windsurfers, catamarans, zodiacs, etc. (*People ex rel. Baker v. Mack* (1971) 19 Cal.App.3d 1040; *Hitchings v. Del Rio Woods Recreation and Park Dist.* (1976) 55 Cal.App.3d 560, 570.) These rights exist in the public even though title to the land underneath the water is privately held. (*Id.*) It is a public nuisance to obstruct this recreational easement. (*People v. Mack.*)

Mr. Uzes' report states that ocean Waters have extended into and landward of the project area. The Commission staff also has evidence in the form of photographs that indicate that cata-

marans, kayaks and other watercraft have landed on and been launched directly over the project site at high tide.

The State Lands Commission, in its letter to the Commission, has advised that the public has a navigational easement over any area covered by waters of the Pacific Ocean and that no project should be permitted to obstruct that public right.

As a result, even if the state did not have title to the area in which the applicant proposed to build his project, he still would fail to meet his burden of proving consistency with Article X, section 4 and sections 30211 and 30221. This project is located in the midst of a zone that is periodically covered by ocean Waters and used by the public for recreational purposes. Thus, its construction would obstruct the public in its continued use of this easement. Such an obstruction would constitute a public nuisance and be in contravention of sections 30211, 30221 and Article X, section 4. Again, this ground too provides sufficient basis by itself for denial.

3. Public Access—Historic Use

As proposed, these projects would extend out onto and cover sandy beach in an area previously available and used, as discussed below, for shoreline access and public use. All projects requiring a Coastal Development Permit must be reviewed for compliance with the public access provisions of Chapter 3 of the Coastal Act. Based on the access, recreation and development sections of the Coastal Act, the Commission has required public access to and along the shoreline in new development projects and has required design changes in other projects to reduce interference with access to and along the shoreline.

A major access issue in this permit is the occupation of sand area used by the public by a structure, in contradiction of Coastal Act policies 30211 and 30221. Section 30211 requires that development shall not interfere with access:

> Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30221 requires that development providing public recreational opportunities is preferred to increased commitment of the coastline to private use:

> Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Interference by the proposed rock revetment and overlying residential structure has a number of effects on the dynamic shoreline system and the public's beach ownership interests. First, changes in the shoreline profile, particularly changes in the slope of the profile, alter the usable area under public ownership. This is discussed in greater detail below under "Mechanisms of Impact." In this case the revetment appears to be located on public land or the public trust easement area at least part of the time, so the impact would be direct and immediate. While a vertical caisson well could minimize potential encroachment of the protective structures on to public trust areas, construction of the residences on caissons seaward of the vertical wall would still effectively interfere with public interests.

However, even if this were not the case, the application raises issues involving protection of potential public rights acquired under the legal doctrines of prescription or implied dedication.

The beaches of Malibu are extensively used by visitors of both local and regional origin and most planning studies indicate that attendance of recreational sites will continue to significantly increase over the coming years. As discussed below, it appears that Lechuza Beach is no exception.

The subject sites are contained within a sandy cove, about 2,000 feet in length. During the summer, a beach runs the length of the cove and can be as such as 8 acres. Residential development on the cliffs above the sandy beach began in the early 1930's and over time two bluff-face stairways (date unknown) were built to the sandy beach, one off of Broad Beach Road and the other at the end of West Sea Level Drive. According to residents in Malibu-Encinal Homeowners Association (MEHA), a license was given to the inland homeowners to use these stairways and roadways through the tract (east and West Sea Level Drive) to the beach. However, as the entrance to the private access roads and stairs to the beach are located off Broad Beach Road, a public road that was formerly Pacific Coast Highway, the public historically parked on the wide shoulder of Broad Beach Road and then utilized the roadway and stairways to reach Lechuza Beach; Residents of the area state that due to the extensive public use of the roadways (primarily by cars) and stairways, in 1978 the homeowners installed gates at the entrance of the access roads and stairway off of Broad Beach road to prevent the public from using them. Almost two years ago MEHA opened the pedestrian gates and removed the signs from the access roads to once again allow walking access down the two access roads which lead to the beach.

Lechuza Beach can also be accessed laterally. Downcoast (east) from Broad Beach, at low tides, adventurous people can traverse the rocky shoreline at Lechuza Point and then gain access to Lechuza Beach. A home was approved by the Commission, under CDP P-78-2824 (Beyer), an the point with a lateral access easement over the portion of the point 10 feet seaward of the residence. By far the majority of beach users gaining access to Lechuza via the tidelands come from El Matador State Beach, located about 1,000 feet west (upcoast) of Lechuza. El Matador is a unit of the Robert H. Meyer Memorial State Beaches (The other two units, La Piedra, State Beach and El Pescador State Beach are located upcoast of El Matador.) These three units of the State Beach front directly on Pacific Coast Highway, contain

bluff top parking lots, restroom facilities, and bluff face stairways which terminate at large sandy coves. Private development, including beach frontage, separates these three units. State lifeguards patrol both the Nate beach areas and parking lots in the summer months. All units are well signed from Pacific Coast Highway and are heavily used. According to State Parks, in FY 1988/1989 209,811 persons used these three state beaches and in FY 1989/90 131,032 utilized these beaches. Commission staff observed that many of the public beach users commonly walk downcoast to Lechuza Beach, and recreate there picnic, swim, surf, walk, etc. Staff has also observed that private security guards are sometimes stationed at the downcoast and of El Matador State Beach and have been seen stopping beach walkers and informing them that the sandy beach between El Matador and Lechuza is private. This encounter has discouraged some people from continuing their walk to Lechuza Beach. Staff does not know how long these private guards have been on the beach and an investigation is pending to determine if this activity is infringing upon public rights.

In order to determine the extent of any public prescriptive rights that may exist on Lechuza Beach itself, staff conducted a survey of beach users for several summer days in 1992. During that time, staff observed hundreds of people walking along the shoreline and many groups were picnicing up on dry sand. Forty-six public use questionnaires have been completed and the earliest public use noted began in 1970. Many of the respondents used the beach as if it were public land, at a frequency of about one time a month for various activities such as sunbathing and swimming. Users were evenly split between Malibu residents and those outside Malibu. Although some respondents reported that they had permission to use the beach, most respondents indicated that they did not. In addition, MEHA has submitted a petition signed by 495 people who used Lechuza Beach between June 30 and September 8, 1991. These are persons who do not reside in the Malibu Encinal Tract-and are not members of the homeowners association. The home-

owners association has previously submitted a petition of 796 signatures indicating persons who have used the beach and are in opposition to the proposed development.

The Malibu Encinal Homeowners' Association retained a marketing firm. THW Marketing, to conduct a survey of public use of Lechuza Beach. The source of names was the set of petitions noted above. According to the summary prepared by THW, there were approximately 813 signatures, 581 of which were legible. According to THW, these individuals were called, and 67 individuals responded fully or partially completed the survey. THW also submitted statements by the questioners declaring that they asked only the questions on the prescribed sheet, and did not attempt to Influence any of the respondents' answers.

Staff has reviewed these responses in combination with the information previously obtained by staff, in light of the memo from the Legal Division to the Commission dated February 10, 1992, which indicates there are a number of steps in the implied dedication analysis:

1. Will the proposed development interfere with or adversely affect an area of the property that the public has used?

   If there is no potential interference or adverse effect, the analysis stops. If there is potential interference or adverse effect it continues.

2. Is there substantial evidence that the area used by the public has been impliedly dedicated?

   The basic elements that must be present are:

   A. The public must have used the land for a period of five years or more as if it were public land.

   B. Without asking for or receiving permission from the owner.

C. With the actual or presumed knowledge of the owner,

D. Without significant objection or bona fide attempts by the owner to prevent or halt the use, and

E. The use must be substantial, rather than minimal.

Because the proposed project is on a sandy beach now used for recreational purposes, there is potential interference. THW has provided Commission staff with both a summary and a printout of the individual responses. Of these responses, 19 individuals outside Tract 10630 indicated they had used the entire beach for greater than five years without asking for or receiving permission. Fourteen of these individuals appear to live outside of Tract 10630 and the immediately adjacent tract. These responses included access from the neighboring beach (4) and access from the "staircase" (8) or road/pathway(s) (2).[3] An additional 9 persons indicated they had used the entire beach without permission for 3 to 5 years, and 2 more indicated vertical access for use of the wet sand or water area for greater than 5 years.

The applicant's representative has submitted a memorandum arguing that the use of the beach area has been limited to that of the residents of the Malibu Encinal Tracts for "more than 20 years." Some of the 67 phone survey respondents indicated they lived in the 10630 tract or were guests of those in the area, but most respondents with outside addresses indicated they did not ask for or receive permission to use the beach. While there are statutory mechanisms for preventing implied dedication, such as recordation of a notice under Civil Code section 813 or posting under Civil Code section 1009, the Stacey memo indicates that

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[3] The evidence from these responses regarding vertical access is not specific as to which staircase or pathway was used.

agreements under Civil Code sections 813 and 1009 were not recorded until September 2, 1992, and the responses to the phone survey indicate the respondents saw no posted signs before 1990. As noted in the February 10, 1992 memo, both of these methods may be used to prevent property from being impliedly dedicated; however, they do not affect prescriptive or implied dedication rights arising before such posting. These signs were apparently only at the Broad Beach Road entrances to East and West Sea Level Drive. The beach area itself is not and has not been posted. Thus, non-expressly- permitted use of the beach itself for five years prior to the September of 1992 recording could be considered evidence of implied dedication or prescriptive rights on the beach area.

The applicant's representative argues that the law requires that the use be "continuous and uninterrupted" and that "the public, whether through local government or civic associations, have contributed to the maintenance a patrolling of such beaches." These assertions are unsupported by case law. On the contrary, seasonal fluctuation of use does not negate evidence of prescriptive use or implied dedication. (*See Gion* v. *County and City of Santa Cruz* (1970) 2 Cal.3d 29, 40; 84 Cal.Rptr. 162, 168.) There is also no *requirement* that there be public maintenance of the beach in order to establish implied dedication; it is merely a factor to be considered. *See Gion* at 2 Cal.3d 29, 44; 84 Cal.Rptr. 162, 171, in which it was stated that in *Dietz* v. *King* (the companion case) no governmental agency took an active part in maintaining the beach and road. Nonetheless, implied dedication was found.

Although the evidence is in conflict, the Commission finds that there is substantial evidence of public prescriptive rights. Although the project does not appear to be consistent with section 30211, there are other grounds for denial of the project. Accordingly, there is no need for the applicant and/or the Commission to expand the considerable financial resources that would be required to more fully explore the historical evidentiary

record of public prescriptive use of the sandy beach area on which the project is proposed.

C. Shoreline Protective Devices

The Coastal Act policies related to construction of shoreline development protective devices and hazards are as follows:

Section 30250(a):

Now residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of the surrounding parcels.

Section 39225:

Revetments, breakwaters, grains, harbor channels, seawall, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosions and when designed to eliminate or mitigate adverse impacts an local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

Section 30253:

New development shall:

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

The certified Malibu/Santa Monica Mountains Land Use Plan contains the following policies relative to shoreline development and flood hazard:[4]

P147 Continue to evaluate all new development for impact on, and from, geologic hazard.

P148 Continue to limit development and-road grading on unstable slopes to assure that development does not contribute to slope failure.

P149 Continue to require a geologic report, prepared by a registered geologist, to be submitted at the applicant's expense to the County Engineer for review prior to approval of any proposed development within potentially geologically unstable areas including landslide or rock fall areas and the potentially active Malibu Coast-Santa Monica Fault Zone. The report shall include mitigation measures proposed to be used in the development.

P151 Continue to evaluate all new development for its impact on, and from flood and mudflow hazard.

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[4] Although the certified Malibu/Santa Monica Mountains Land Use Plan is no longer legally binding upon either the Commission or the new City, many standards contained in the LUP are still relevant to development within the City and will continue to be used as guidance in the absence of a certified city LCP.

P152 Prohibit buildings within areas subject to inundation or erosion unless proper mitigation measures are provided to eliminate flood hazard

P153 On sites exposed to potentially, heavy tidal or wave action, new development and redevelopment shall be sited a minimum of 10 feet landward of the mean high tide line. In developed areas where new construction is generally infilling and is otherwise consistent with LCP policies the proposed structure mat extend to the stringline of existing structures on each side.

P166 Seawall shall not be permitted unless the County Engineering has determined that there are no other less environmentally damaging alternatives for protection of onshore development. Revetments, seawall, cliff retaining walls and other such construction shall be permitted only when required to serve coastal-dependent uses or to protect existing structures or new structures which constitute infill development.

P167 Revetments, groins, cliff retaining walls, seawall, pipelines, and outfalls, and other such construction that may alter natural shoreline processes shall be permitted when designed and engineered to eliminate or mitigate adverse impacts on shoreline and sand supply

1. <u>There is an ongoing debate over the effects of seawall on-shoreline stability</u>. The proposed project involves a shoreline structure which will affect the configuration of the shoreline and the beach profile and have an adverse impact on the shoreline. The precise impact of shoreline structures on the beach is a persistent subject of controversy within the discipline of coastal engineering, and particularly between coastal engineers and marine geologists. Much of the debate focuses on whether

seawall or other factors are the primary cause of shoreline retreat. This debate tends to obscure the distinction between the long-term trends of the shoreline, and the effects of seawall on those long-term trends, and the shorter term effects that might not be permanent but may significantly alter the width and utility of a beach over the course of a year. The long-tern and short-term effects of seawall will be discussed separately below.

The Coastal Act recognizes that protective devices may be needed to protect *existing* structures, that such structures my alter shoreline processes, and that those alterations should be minimized and mitigated. The ongoing debate in the literature does acknowledge that seawall have some effect, at least on the supply of sand. A succinct statement of the adverse effects of seawall, and the viewpoint of coastal geologists that view beach processes from the perspective of geologic time, is contained in *Saving the American Beach: A Position Paper by Concerned Coastal Geologists* (March 1981, Skidaway Institute of Oceanography) which was signed by 94 experts in the field of coastal geology (page 4):

> These structures are fixed in space and represent considerable effort and expense to construct and maintain. They are designed for as long a life as possible and hence are not easily moved or replaced. They become permanent fixtures in our coastal scenery but their performance is poor in protecting community and municipalities from beach retreat and destruction. Even more damaging is the fact that these shoreline defense structures frequently enhance erosion by reducing beach width, steepening offshore gradients, and increasing wave heights. As a result, they seriously degrade the environment and eventually help to destroy the areas they were designed to protect.

It is widely recognized that large structures such as groins and breakwaters will have significant and obvious impacts on sand supply and beach profiles. As stated in a publication by the State Department of Boating and Waterways (formerly called

Navigation and Ocean Development). *Shore Protection in California* (1976) (page 30):

> While seawall may protect the upland, they do not hold or protect the beach which is the greatest asset of shorefront property. In some cases, the seawall may be detrimental to the beach in that the downward forces of water, created by the waves striking the wall rapidly remove sand from the beach.

This impact is reiterated in the paper. "Economic Profiling of Beach Fills" by Herman Christiansen which is contained in the proceedings of *Coastal Sediments '77* (November 1977). It states (page 1047):

> Observations at some of the investigated beaches have shown that an optimal profile becomes instable, if structures, such as rock, groins, revetments, piles, stairs etc., are placed within the wave action zone of a beach. Steady erosions, caused by complex high turbulent surf currents, lead to heavy sand losses.

In contrast to the perspective of coastal geologists, a number of coastal engineers argue that seawall are symptoms of coastal erosion rather than causes. At least in part, the perspective of coastal engineers reflects their perspective of a time scale that Involves the life of a structure. This viewpoint is perhaps best expressed by the renowned expert in beach processes R. G. Dean, who attributes changes in beach profiles to erosion rather than structures, in this discussion from "Coastal Sediment Processes: Toward Engineering Solutions" in *Coastal Sediments '87* (page 22):

> Placed along a shoreline with an erosional trend, armoring can perform the intended function of upland stabilization while the adjacent shoreline segments continue to erode. The resulting offset between stabilized and unstabilized segments may be interpreted incorrectly that the armoring has caused the adjacent erosion.

Dean's article goes on to acknowledge potential adverse effects and the responsibility for mitigation of those effects (page 23):

> . . . Armoring can cause localized additional storm scour, both in front of and at the ends of the armoring . . . Under normal wave and tide conditions, armoring can contribute to the downdrift deficit of sediment through decreasing the supply on an eroding coast and interruption of supply if the armoring projects into the active littoral zone.
>
> If armoring is deemed warranted to protect a threatened structure and if rational assessment concludes that installation of the armoring would adversely affect the shoreline, mitigation in the form of periodic additions of beach quality sediment should be considered.

Research on the effects of seawall continues, and many of the results are not yet available. Much of the research is anecdotal, with diminished beach width evident, but the major causes not clearly identified. The potential role of seawall remains disturbing, as noted in the conclusion to "Coastal Erosion on the Barrier Islands of Pinellas County, West-central Florida", by William O. Sayre, also in *Coastal Sediments '87* (page 1049):

> In two years of surveying, beach erosion and recovery on the barrier islands of Pinellas County has been measured. An undeveloped island's beach recovered quickly after winter-time and hurricane-caused erosion. A highly developed beach without a seawall and near a jetty fared almost as well, recovering more slowly, but showing no net erosion over the two year period. The two other sites, an highly developed barriers and backed by seawall, have suffered greatly. One narrow beach was completely destroyed by a hurricane and only partially recovered. The other was reduced by at least a quarter and was artificially nourished.

In a 1985 paper on "Effects of Small Protective Devices on Beaches" by Craig Everts (published in *California's Battered*

Coast, proceedings from a Conference on Coastal Erosion sponsored by the California Coastal Commission). Mr. Everts examined the use of shoreline protective devices and beach nourishment, and found that:

> "Important, but generalized, observations concerning PDs (protective devices) in Southern California are these:
>
> "Their effect on a shoreline that is stable or advancing over a long time period is negligible.
>
> "On a coast experiencing net shoreline retreat, a PD can increase the short-term reversible changes that occur in beach width, but it will usually have little or no role in modifying the net shoreline retreat
>
> *On a coast experiencing net shoreline retreat, a PD fixes the landward boundary of the beach. When it would act otherwise be fixed at that location the PD is partly responsible far a progressive narrowing of the beach."
>
> "However, a PD is potentially responsible for five short-term or reversible effects: (1) wave energy concentration at the PD; (2) wave energy enhancement at the PD; (3) seaward-directed wave energy reflection at the PD; (4) an increase in longshore sediment transport in front of the PD, and, (5) where wing (return) walls are used, wave reflection toward adjacent beaches or structures. These reversible effects occur during storms and may temporarily cause the local shoreline to retreat at a greater rate than It is retreating along adjacent beaches without PD's. In the post-storm period of recovery, the beach in front of a PD will usually rebuild at a greater rate. This occurs not because the PD is present, but because the local beach and shoreface tend to return to their smooth and gently curving or straight regional equilibrium shape."

Gary Griggs and James Tait conducted a two-year study of the end effects of seawall in Monterey Bay. They note that "visual

observation and survey data, however, indicate that an arcuate area of scour, or lowered beach profile, extended as far as 150m downcoast. It is unclear how much of this 1500 downcoast zone of influence is controlled directly by end reflection and how much is controlled by the reorientation of the shoreline expected downdrift from any structure extending into the surfzone." (From "Observations on the End Effects of Seawall" by Gary Griggs and James Tait, *Shore and Beach*, January 1989.) These end effects would be expected only when the seawall was exposed to wave attack and this scour would disappear eventually during post-storm recovery, however, such downdrift scour could be expected from seawall elsewhere in the California coast.

More recently, Nicholas Kraus undertook an extensive literature search on the interaction of seawall and beaches and found similarly that, while seawall will have little if any effect on a beach with a large supply of sand, there will be effects to narrow beaches or beaches eroded by storm activity. In "Effects of Seawall on the Beach", published in the Journal of Coastal Research, Special Issue #4, 1988, Dr. Kraus stated that:

> "It is concluded that beach change near seawall, both in magnitude and variation, is similar to that on beaches without seawall, if a sediment supply exists. Sediment volumes eroded by storms at beaches with and without seawall are comparable, as are post-storm recovery rates. In addition, the shape of the beach profile after construction of a seawall is similar to the pre-construction shape If a sediment supply exists. . . . The form of the erosional response to stores at seawall is typically different, however, with foreshore erosion that occurs on beaches without seawall manifested as more localized toe scour and end effects of flanking and impoundment at seawalls. . . .
>
> At the present time, three mechanisms can be firmly identified by which seawall may contribute to erosion at the coast. The most obvious Is retention of sediment behind

> the wall which would otherwise be released to the littoral system. The second mechanism, which could increase local erosion on downdrift beaches, is for the updrift side of the wall to act as a groin and impound sand. This effect appears to be primarily theoretical rather than actualized in the field, as a wall would probably fall if isolated in the surf zone. The third mechanism is flanking i.e., increased local erosion at the ends of walls. . . . Three additional causes of erosion imputed to seawall that are mainly speculative with no firm quantitative support are: increased turbulence due to wave reflection . . . ; offshore transport of sediment by rip currents that may develop at the ends of walls . . . ; and the enhancement of transport by a short-crested wave system composed of incident and reflected waves. The three latter, more speculative, mechanisms described above have not, been quantitatively documented in field studies." (from "Effects of Seawall on the Beach", by Nicholas Kraus in the Journal of Coastal Research. Special Issue No. 4, 1988)

Finally, recent correspondence on seawalls by Dr. Douglas Inman, a professor of Oceanography at Scripps Institution and renowned authority on southern California beaches stated:

> "Seawall usually cause accelerated erosion of the beaches fronting them and an increase in the transport rate of sand along them. While natural sand beaches respond to wave forcing by changing their configuration into a form that dissipates the energy of the waves forming them, seawall are rigid and fixed, and at best can only be designed for a single wave condition. Thus, seawall introduce a disequilibrium that usually results in tie reflection of wave energy and increased erosion seaward of the wall. The degree of erosion caused by the seawall is mostly a function of its reflectivity, which depends upon its design and location. The likely detrimental effect of the seawall on the beach can usually be determined in advance by competent

> analysis." (from a letter dated 25 February 1991 to Lesley Ewing from Dr. Douglas Inman)

The Commission notes the continuing debate over the effects of seawall, the lack of convergence in the literature, and the strong identification of viewpoints with the disciplines of coastal engineering and marine geology. The Commission does not believe that it is entirely accidental that this debate his arisen between disciplines with such fundamentally different perspectives on the time scale involved in analyzing physical processes. The Commission believes that more information can be shed on this subject through explicit consideration of long-term and short-term processes active on a beach.

2. The effects of a protective device on an eroding shoreline. The location of a proposed shoreline structure on the seasonal profiles of a beach (that is, the proximity of the structure to the waves), and the overall erosion pattern of a beach, are two key factors that determine the impact of seawalls. Although debate persists as to whether a shoreline structure is the cause or merely a symptom, it is generally agreed that where a beach is eroding, a seawall will come to define the boundary between the sea and the upland, H.V. McDonald and D.C. Patterson state, in "Beach Response to Coastal Works Gold Coast, Australia" In *Coastal Engineering 1984* (page 1537):

> On the persistently eroding beaches at North Kirra and Palm Beach, the receding beachline has effectively placed the seawall progressively further and further seaward on the beach profile until no beach exists at all in front of the wall. Clearly, the establishment of fixed seawall alignments on persistently eroding sections of beach will lead eventually to loss of the beach as a useful recreational amenity.

Whether or not the seawall or erosion leads to the loss of the beach continues to be debated in the literature, but the distinction does not alter the result: when the beach in front of the

structure disappears over time the natural shoreward migration of the beach is blocked by the structure. The net effect is documented in a recent National-Academy of Sciences Study "Responding to Changes in Sea Level, Engineering Implications" (1987), which provides (page 74):

> A common result of sea wall and bulkhead placement along the open coastline is the loss of the beach fronting the structure. This phenomenon, however, is not well understood. It appears that during a storm the volume of sand eroded at the base of a sea wall is nearly equivalent to the volume of upland erosion prevented by the sea wall. Thus, the offshore profile has a certain "demand" for sand and this is "satisfied" by erosion of the upland on a natural beach or as close as possible to the natural area of erosion on an armored shoreline. . . .

While the experts continue to discuss the exact manner in which seawalls affect shoreline processes, the Commission must make decisions about specific projects. The Commission notes that the debate focuses on the cause of erosion rather than the loss of the beach, and begs the critical factual question of whether or not the beach disappears.

On an eroding shoreline fronted by a beach, a beach will be present as long as some sand is supplied to the shoreline. As erosion proceeds the entire profile of the beach also retreats. However, this process stops when the retreating shoreline comes to a seawall. While the shoreline on either side of the seawall continues to retreat, shoreline retreat in front of the seawall stops. Eventually, the shoreline protected by the seawall protrudes into the water, with the winter MHT fixed at the base of the structure. The Commission is led inexorably to the conclusion that if the seawall works effectively on a retreating shoreline, it results in the loss of the beach, at least seasonally. If the shoreline continues to retreat, however slowly, the seawall will be where the beach was, and where the beach would be absent the presence of the seawall. This represents the loss of a

beach as a direct result of the seawall. The Commission has observed this phenomena up and down California's coast, where a seawall has successfully halted the retreat of the shoreline, but only at the cost of usurping the beach. Although this my occur only slowly, the Commission concludes that it is the inevitable effect of constructing a seawall on an eroding shoreline. For such areas, even as erosion proceeds, a beach would be present In the absence of a seawall.

The Commission's previous observations about the effects of seawalls on access have been upheld in previous decisions. In the cast of *Whalers' Village Club v. Cal. Coastal Commission* (1985) 173 Cal.App.3d 240, 259-261 [220 CR 2], *cert. denied* 106 S.Ct. 1962 (1986), the Court of Appeal analyzed in the following terms the legal sufficiency of the adverse impacts discussed in these findings to justify a lateral access dedication:

> Respondent challenges the nexus between the Commission's finding that the revetment imposts a burden on the public which justifies imposition of the access condition and the evidence in the record. [Citation omitted.] In point, respondent argues that the Commission found a public "burden" because seawalls *in general* tend to cause additional sand scour an any historically eroding beach but did not find that this particular revetment cause such damage. [Emphasis in original.]
>
> . . .
>
> There is substantial evidence in the administrative record to support the staff's, conclusion that seawalls and revetments tend to cause sand loss from beach areas in front of and adjacent to them even if they protect immediate structures. Studies cited in staff reports . . . confirm the staff's finding that "by artificially building up the slope of the shore area, seawalls and revetments of this type tend to cause a landward retreat of the mean high tide line . . . ."
>
> . . .

> Staff reports . . . referred to surveys of the Army Corps of Engineers and other experts concerning shoreline erosion along the California coast and, in particular, beach erosion in Ventura County. The Commission [thus] had sufficient information before it to conclude that, due to construction of this revetment *and others* up and down the coast, the erosive nature of the beaches in Ventura County coupled with the tendency of seawalls and revetments to increase the sand loss on beaches with a tendency to recede constitutes a cumulative adverse impact and places a burden on public access to and along State tide and submerged lands for which corresponding compensation by means of public access is reasonable. [Emphasis in original; citations omitted.]

3. The effects of shoreline structures on an "equilibrium" shoreline. The term equilibrium cannot accurately be applied to a feature that varies as much as a shoreline. Almost all California beaches vary dramatically in profile between winter and summer; the variation In the width of beach that can accompany that seasonal change can be over 200 feet. The persistent analytical problem in dealing with shore processes in California is to try to discern long-term trends in shoreline change from the normal, seasonal variation. The term "dynamic equilibrium" has come into use and has been applied to beaches that vary seasonally in width, but are approximately the same when summer (or winter) profiles are compared over a number of years. Essentially, a beach in dynamic equilibrium is one where the supply and loss of sand are in approximate balance (See Griggs and Jones, 1984). This term must be used with some caution, as there will be some variation in width oven seasonally, shown graphically by J. W. Johnson in "Seasonal Bottom Changes, Bolinas Bay, California", *Proceedings of the Twelfth Coastal Engineering Conference*, September 13-18, 1970. That variability can mask long-term changes (either erosion or accretion) unless sufficient data is available to detect a clear direction. This discussion will be equally applicable to

shorelines that are truly In "dynamic equilibrium", that is, not eroding on the long-term, and to shorelines that are eroding at a relatively slow rate so that seasonal changes are approximately the same when viewed in the time frame of a few years.

The question of the effects of seawalls on shorelines that are in 'dynamic equilibrium' is more complicated, and research on the effects is even-more anecdotal. At the same time, because the short-term effects may be of great importance, much more rigorous data collection is required in order to establish any clear effects. One such effort has been undertaken by Gary Griggs of UC Santa Cruz. Professor Griggs is monitoring the profiles of beaches in Monterey Bay over the course of several years, and comparing the profiles of beaches with seawalls to control beaches without seawalls. Through this monitoring, Professor Griggs has identified two distinct effects of seawalls. First, beach profiles in front of seawalls differ from profiles along the control beaches during the process of beach erosion. Although the beaches were similar at their most accreted and eroded stages (the summer and winter profiles), the beaches with seawalls were narrower and steeper during the period when the beaches were eroding from summer to winter profiles. This represents a loss of beach in the short term, even where the monitoring record is of too short duration to detect erosion patterns on the beach. Second, beach profiles at the end of a seawall are further landward than natural profiles. This effect appears to extend for a distance of about 6/10 the length of the seawall and represents both a spacial and temporal loss of beach width directly attributable to seawall construction. Dr. Griggs' own conclusion about the effects of seawalls, in a manuscript submitted to the Journal of Coastal Restoration titled *The Impact of Seawalls on Beaches* is:

> Based on 12 months of surveying at 4 locations in northern Monterey Bay (including a winter of only mild or moderate wave conditions) where seawalls or revetments abut unprotected beaches, sow consistent seasonal beach changes

have been documented. These changes or differences in beach profiles are a result of greater wave reflection from the protective structures than from the adjacent control beaches. All of these changes observed in this study appear to be temporary or seasonal in nature and are best developed in the fall and winter months during the transition from summer swell to winter storm conditions.

The seasonal effects documented include:

1) Loss of the summer berm sooner in front of all seawalls relative to adjacent unprotected control beaches.

2) Erosion of the berm in front of a vertical impermeable seawall (due to greater wave reflection) before berm loss on an adjacent beach backed by a permeable sloping revetment.

3) A lack of significant difference in winter beach profiles seaward of seawalls or revetments and adjacent control beaches.

4) Loss of beach up to 150 m downcoast from seawalls due to reflection from and of structure.

5) Late spring/summer berm rebuilding takes place independently of any protective structure leaving a uniform alongshore berm crest.

The Commission concludes from this information that seawalls have serious adverse effects on the width of the beach, even when examined over a relatively short period on a beach that might not be eroding. Although the beach profile at Its widest and narrowest may not differ significantly, the beach width and utility will differ markedly during the period when the beach is changing from summer to winter profile. These effects have been observed by the Commission's staff over the years, and can lead to a situation where there is a narrow but usable beach on

an unprotected portion of the beach, while the adjacent, protected beach is not passable.

The 1981 statement signed by 94 respected coastal geologists indicates that important public interests in shoreline resources can be harmed through the introduction of shoreline defense structures. Thus, in evaluating an individual project, the Commission must assume that the principles reflected in that statement are applicable. To do otherwise would be inconsistent with the Commission's responsibilities under the Coastal Act to protect the public's interest in shoreline resources.

4. Mechanisms of Impact/Shoreline Erosion/Infill Development.

The applicant is proposing rock (rubble) revetments to protect the septic systems and portions of Sea Level Drive. The revetments will be constructed at a 1.5:1 slope H:V), and will occupy a large area of beach. Rock revetments operate on the principle that much of the wave's energy will be absorbed by the rocks and dissipated within the voids of the wall, thereby protecting the landward area from erosion and direct wave attack. When a revetment is backed by a geofabric layer, as is the proposed revetment, the geofabric often functions like a solid barrier; and reflects all wave energy which penetrates through the revetment rock layer. Griggs and Fulton-Sennett found, in "Coastal Protection Structures and their Effectiveness", that:

> Rip rap walls certainly reflect a smaller percent of wave energy than do vertical wood or concrete walls. However, during high tides and under certain wave conditions, reflected waves from rip rap walls have been observed to combine with incident waves, causing erosion and damage to adjacent areas, especially in small embayments.

As an alternative to the rock revetment, the applicant submitted a vertical caisson seawall design. (This submittal did not contain preliminary local discretionary approval.) Typically, vertical walls are used to both protect the material behind them from

wave attack and to support the material in a smaller area than would be needed if the material were to rest at a natural angle of repose. A vertical seawall will typically occupy less beach area than a rock revetment; however, since these walls reflect much more wave energy than a rock revetment there is great concern about scour and adverse impacts on sand supply. The vertical wall submitted by the applicant would require detailed review for potential scour and sand supply impacts.

The literature on coastal engineering repeatedly warns that unprotected properties adjacent to the seawall may experience increased erosion. A rock will very often protrudes seaward from development and exacerbates this situation. Field observations have verified this concern, see for example the paper by Gerald G. Kuhn of the Scripps Institution of Oceanography entitled "Coastal Erosion along Oceanside Littoral Cell, San Diego County, California" (1981). In this paper, it is written and pictorially illustrated that erosion on properties adjacent to rock seawall is intensified when wave runup is high. This subject is presently being researched by scientists at Oregon State University. The preliminary results of that work was reported in "Laboratory and Field Investigations of the Impact of Shoreline Stabilization Structures on Adjacent Properties" by W.G. McDougal, N.A. Sturtevant, and P.D. Komar in *Coastal Sediments '87*. These researchers are investigating the length of shoreline affected by heightened erosion adjacent to seawalls. Their conclusion is (page 972):

> Results to date indicate that erosion at the ends of seawalls increases as the structure length increases. It was observed in both the experimental results and the field data of Walton and Sensabaugh (1978) that the depth of excess erosion is approximately 10% of the seawall length. The laboratory data also revealed that the along-coast length of excess erosion at each end of the structure is approximately 70% of the structure length.

A discussion of the physical processes of wave runup on a natural shore will help establish the effects of seawalls on shoreline processes. Sandy beaches are dynamic systems, the individual grains of sand adjust quickly to both the overall supply of sediment and the ongoing forces of waves. A typical non-storm profile of the beach has adjusted to a low-energy wave environment, reflecting the short period, low energy waves that strike the beach. When attacked by longer period, higher energy waves, the beach adjusts by changing its profile. First, higher wave energy erodes material from the foreshore and deposits the material off-shore in a bar. Second, the shoreline profile flattens to absorb the greater amount of wave energy, even with waves breaking on the bar. These adjustments are fundamental to the shore's attack by high energy waves. The dynamic process of eroding material from the foreshore enables the shoreline to absorb wave energy.

This process goes on continuously; if a given shore profile is not flat enough to absorb wave energy without further erosion, additional material is moved from the shore to the bar to increase the distance between the bar and the inland extent of the wave uprush. The value of the bar cannot be over-emphasized, it is on the bar that winter waves initially break, and the dynamic processes of the actual shoreline are affected by wave uprush and reformation, not actual breaking waves.

When a revetment is installed, there are dramatic effects on the shoreline. Material formerly available to nourish the bar is now unavailable because it is either behind the seawall, or has been replaced by the seawall. As a result, the bar receives less material. This makes the bar less effective in causing waves to break offshore, and results in greater wave energy reaching the shoreline. That energy is then dissipated by uprush and reflection against the face of the revetment. However, since more energy comes on-shore, more energy is reflected and sand is scoured from the base of the revetment.

The Commission concludes from the opinion of experts and from an analysis of the process of shoreline dynamics that placement of a seawall within the areas of a shore affected by those processes adversely affects shoreline processes in front of the seawall as well as property on either side of the seawall. Obviously the impact of a seawall is greater the more often it is exposed to wave attack, and seawalls located far up the beach have less impact than seawalls lower on the beach.

The applicant's consulting engineer indicates that the proposed revetment will have little if any effect on shoreline profile or sand transport because of the angle of wave action and the location of the revetment. The report states:

> As far as affecting the littoral transport of material by interrupting the reflection of waves, very little material is transported along this beach by reflection. As noted in Mr. Hales report (reference #33), the majority of the waves in Malibu approach the beach almost perpendicular to beach because of the underwater topography. Regardless from which direction the deep water ocean storm waves approach the coast, ultimately, through the processes of island sheltering, refraction and bottom drag, the waves will approach the shore in a relatively perpendicular direction, that is, 90 degrees to the foreshore slope. As a result, the littoral drift will be carried almost straight in and backwashed almost straight out. The very few hours per year that the revetment my be subject to wave uprush will have no effect on the long shore transport of material due to reflection of the waves.

The report further states that:

> In the case of the proposed revetment or possibly vertical seawall, the structures will be acted upon only very rarely under storm events of design magnitude. The few times that the revetment would be subject to wave action would cause very little change in the energy level of the waves,

> since the revetment is located so far back on the backshore of the beach that most energy of the wave is lost due to uprush by the time it reaches the exposed face of the revetment.

The applicant's consulting geologist indicates that the location of the proposed revetment will preclude all but rare impact of wave runup and as a consequence, is not likely to significantly affect the beach. The report states:

> The revetment will be located inland 50 feet from the foreshore where it will be virtually untouched by wave runup. It is anticipated that the rare combination of high storm waves superposed on high tide may result in wave uprush impacting the revetment.

The applicant's consultants claim the proposed revetment would rarely be impacted by wave uprush (approximately every 25 years) and therefore, wave action off the revetment would not adversely impact the beach profile. However, in the last 10 years this beach has been completely denuded of sediment twice, in the winters of 1983 and 1988 (Letter from Ian Collins Oct. 12, 1992). In addition, photographic evidence over a number of years and observations by commission staff over the last 10 years indicates this beach is severely depleted of sand in the winter months. Thus, contrary to the applicant's consultants' claim, it is clear that the proposed revetment would be within the area of wave uprush during portions of the winter season. As explained in the findings above, wave action off of a revetment is suspected of increasing erosion of sand and changing the profile of the beach. In addition, the revetment will impound a significant amount of beach sand and cliff talus material behind it and therefore reduce the 'overall supply' of material to the littoral system. Furthermore, the opponents' consulting engineer, Dr. Ian Collins, points out that "An additional factor which is often neglected by coastal engineers is the impact of wind on beach processes." Dr. Collins explains that:

> The explanation as to how a beach can rebuild to an elevation of +9 to +12 feet in times of low waves which do not runup this high is often overlooked. The prevailing onshore seabreeze at this location and others along the California Coast is an important mechanism for the transport of sand towards the bluffs. In essence, small dunes are being continually built by the onshore winds as sand is blown shorewards. This is a slow but not unimportant factor in the storage of beach sand against the bluffs. This stored sand will subsequently act as a reservoir for future storms.

The Commission recognizes that the revetment will most likely change the beach by steepening it, and increasing beach erosion around it; this in turn will interfere with and decrease the amount of sandy beach available for public access. Based on Coastal Act Sections 30250(a) and 30253 and Land Use Plan policies 153, 156, 167, and 251, the Commission has approved shoreline protection devices similar in design (albeit not as long) to that proposed by the applicant only if the device served coastal-dependent uses, protected existing structures, or *protected new structures which were infill development* (emphasis added), provided that they tied into adjacent devices to minimize and/or mitigate adverse impacts on adjacent properties, coastal resources and access. The Commission has approved numerous infill developments along the Malibu coast, in such areas as La Costa Beach, Carbon Beach, Malibu Beach, Puerco Beach, Escondido Beach, Trancas Beach, and the eastern portion of Lechuza Beach. Infill development along the Malibu shoreline can be characterized as the placement of one or two residential structures and protective devices on one or two parcels between adjacent residential structures.

As previously mentioned, four structures have been built on the sand on the far eastern portion of Lechuza Beach (pre-coastal Commission). The Commission has approved three infill houses on this eastern portion of the beach adjacent to or between the

existing residences; 5-89-012 (Liberman), 5-90-302 (Gershonoff) and 5-90-807 (Boeckman). The Commission found in the denial of permit S-87-1028 (Liberman) which was later approved under permit 5-89-012 (Liberman), that the Commission *would not* consider the vacant parcels situated in the deed restricted lots west of the last developed parcels or those lots further west in the roadless section along the beach to be infill or located in an existing developed area. In the approval of Coastal Development permit 5-90-807 (Boeckman) the Commission found that the proposed residence was located on one of the last two developable beachfronting lots on Sea Level Drive. The proposed development is to be located on a beach which, taken as a whole, is largely undeveloped. There is approximately 1,640 feet or 1/3 of a mile between the development an eastern Sea Level Drive and western Sea Level Drive. Therefore, the western portion of Lechuza Beach can only be characterized as undeveloped, pristine sandy beach, one which can not be considered for infill development.

As previously stated, Section 30235 of the Coastal Act clearly indicates that "revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve *coastal dependent uses or to protect existing structures* (emphasis added). . ." In addition, Policy 166 of the Malibu LUP states that "revetments and seawalls shall only be permitted when required to serve *coastal dependent uses or to protect existing structures or new structures which constitute infill development* (emphasis added). As discussed in the previous section, rock revetments have been found to alter natural shoreline processes on sandy beach. The proposed revetment will impound cliff and talus material behind it and reduce the overall supply of material to the littoral system. Additional effects, such as end effect down coast scour and interruption of littoral transport could also be expected during extreme storm events. As presented in recent studies of the effects of seawalls and beaches, a project such as the one proposed by the applicant

can cause short-term impacts to the beach during storm events as well as impounding potential beach materials.

Therefore, the Commission finds that the proposed revetment will result in the alteration of the existing natural shoreline through erosion and the resulting reduction of beach width. The Commission also finds that the proposed residential development and private road are clearly not a coastal dependent use and the proposed revetment is not for the protection of existing development. Therefore, the Commission finds that the projects as proposed are not consistent with Section 30235 and 30250(a) of the Coastal Act and the applicable policies of the Malibu LUP.

D. Hazards/Geologic Stability

The Commission has previously found, in past actions, that many of the oceanfront parcels in Malibu such as the subject site are susceptible to flooding and/or wave damage from storm waves and storm surge conditions. Past occurrences have resulted in public costs (through low-interest loans) in the millions of dollars in the Malibu area alone. Intense storms in the winter of 1977-78 caused serious coastal damage and triggered numerous mudslides and landslides. The "El Nino" storms in 1982-83 caused additional damage, when high tides of over 7 feet were combined with surf between 6 and 15 feet. Storms in 1987-88 did not cause the far-reaching devastation of the 1982-83 storms, however, they too were very damaging in localized areas and could have been significantly worse except that the peak storm surge coincided with a low tide rather than a high tide.

Malibu has experienced coastal damage regularly from winter storms. In *Living with the California Coast*, Griggs and Savoy discuss development at the seaward base of a cliff and note that:

> "Despite the somewhat precarious location of this colony (Malibu Colony), near the mouth of a major creek subject to dangerous winter floods and on a barrier created by

> strong wave action, the houses have proved remarkably persistent over the years, although often threatened by damaging storm seas and high tides. As the amount of land along the immediate shoreline was consumed by subsequent housing, however, more and more structures were built on pilings in potentially dangerous locations at the base of crumbling bluffs . . . Furthermore, these houses and their various protective structures in turn hindered the longshore movement of beach sand, leading to downdrift starvation of beaches to the east. Over the past 60 years, therefore, the pattern of beach erosion has grown in significance until many houses formerly built at the rear of broad backshores now find themselves stranded high above eroding foreshores, the waves periodically pummelling the underlying bluffs that connect the houses to the highway. *The management problems facing this coast can only increase with time, as society as a whole has to pay the penalty for unwise, uncoordinated, and irrational developments of the past.*" (emphasis added)

Significant damage also occurred to coastal areas from high waves, storm surge and high tides. Impacts from the 1978 and 1980 storms were the subject of a symposium by the National Research Council (NRC), Storms, Floods and Debris Flows in Southern California and Arizona 1978 and 1980. In "Coastal Winter Storm Damage, Malibu, Los Angeles County, Winter 1977-78", part of the NRC proceedings, George Armstrong noted:

> "The southerly and southwesterly facing beaches in the Malibu are were especially hard hit by waves passing through the open wave windows between offshore islands. These waves broke against beaches, seawalls, and other structures, causing damages of between $2.8 and $4.75 million to private property alone.
>
> The amount of erosion resulting from a storm depends on the overall climatic conditions and varies widely from

> storm to storm. Protection from this erosion depends largely on the funds available to construct various protective structures that can withstand high-energy waves."

The Malibu coast was again battered by storms in 1982-83. These storms caused over $12.8 million in damage to structures in Los Angeles county, many located in Malibu.

> "In general, the storms greatly affected the character of the Malibu coastline. Once quiet, wide, sandy beaches were stripped of their sand and high surf pounded residential developments . . . . The severe scour, between 8 to 12 feet, was greater than past scour as reported by "old timers" in the area. Sewage disposal systems which rely on the sand cover for effluent filtration were damaged or destroyed creating a health hazard along the coast. Flotsam, including pilings and timbers from damaged piers and homes, battered coastal improvements increasing the destruction. Bulkhead failures occurred when sand backfill was lost due to scour exceeding the depth of the bulkhead sheeting, or scour extending beyond the return wills (side walls of the bulkhead which are extended toward the shore from the front wall of the bulkhead). . . .
>
> Damage patterns were often inconsistent. Adjacent properties suffered different degrees of damage sometimes unrelated to the method or age of construction. The degree of damage was often related to past damage history and the nature of past emergency repairs. . . .
>
> Walls at Zuma Beach and the parking lots were damaged by wave uprush and scour. Debris was deposited onto the margin of Pacific Coast Highway.
>
> Homes along the eastern portion of Broad Beach Road had been constructed in the back shore area and were built below the grade of the street and active beach. Flooding occurred when the vegetated coastal dune was breached

> and street water flowed onto the lots. Blocking of storm drains by debris increased the problem.
>
> The dune deposits along the toe of the bluff near the western end of Broad Beach Road was eroded exposing the too of the bluff to wave attack. Areas underlain by colluvium, fill, and slopewash were particularly susceptible to erosion which resulted in Instability of portions of the bluff. Foundation setback lines based on the previous bluff configurations were now not as conservative as originally thought." (from "Assessment of 1982-83 Winter Storms Damage Malibu Coastline, by Frank Denison and Hugh Robertson, in *California Geology*, September 1985)

The existing structures on the eastern portion of Lechuza Beach did experience some minor damage in the 1983 storms. According to Donald Kowalewsky Geologist for the City of Malibu, a property approximately 1/4 mile from Sea Level Drive, near El Matador Beach, lost approximately 20 feet of cliff and talus material during the March 1983 storm. While performing a site inspection near Sea Level Drive, Mr. Kowalewsky also visited Sea Level Drive and observed that from 10 to 20 feet of cliff and talus material had been removed from the base of the cliffs at Sea Level Drive. Furthermore, he observed that stairways which had led to the beach from Upper Sea Level Drive had been washed out or torn from the bluff.

The preceding accounts of recurring storm damage to coastal structures along the Malibu coast are a clear indication of the potential hazards to development located in or near the surf zone, or on the beach. Recent storm records indicate that extreme events have occurred with regularity, causing rapid transformations of wide sand beaches, and endangering the structures protected by these beaches. As stated by Mr. Armstrong, "protection from this erosion depends largely on the loads available to construct various protective structures that can withstand high-energy waves". The existence of a protective beach alone, cannot be viewed as adequate protection for

shoreline development, without detailed evidence of the persistence of such protection through the recent store events. Mr. Kowalewsky's observations of the Sea Level Drive cliffs following the March 1983 storms provide evidence that the beach at the proposed project site would not provide such protection.

As proposed, the residences would be elevated structures, built on caissons to protect the structures from storm waves and storm surge. The access roads and leachfields for the properties are intended to be protected from storm events by the two proposed revetment designs. Experience from historic storm events in Malibu indicate that this protection is essential to the long-term viability of both the road and leachfield.

The applicant's submittal includes a Wave Uprush study prepared by David Weiss (Coastal Engineer) and a Geology Report prepared by John Merrill (Engineering Geologist). The uprush study indicates that the wave uprush would extend approximately 37 feet landward of the Sea Level Drive right-of-way which is at the base of the coastal bluff. The coastal engineer recommends the proposed residences be supported on concrete caisson and grade beam foundations. In addition, he recommends a bulkhead and revetment to protect any sewage disposal systems and leachfield, as well as the future Sea Level Drive from wave uprush and beach scour. The applicant's geology report states:

> [The lots] may be developed residentially in accordance with applicable elements of the County Building Ordinance, and the recommendations of project consultants, who should review plans to verify that their recommendations have been met.

The proposed cul-de-sac design scheme would leave the central portion of the beach without a seawall. As described in the preceding section, erosion increases at the end of seawalls by

focusing the wave energy as it reflects off the wall. Dr. Ian Collins states in his report concerning this beach that:

> Almost all coastal engineers and geologists agree that at the "ends" of protective structures there is some focussing of wave energy as the waves partially reflect off the structure. This implies that the local bluff area near the terminus of the cul-de-sac protective structures will be attacked more vigorously if the beach is depleted and waves reach the protective structure.

The applicant's engineer, David Weiss, as previously cited above, indicates that

> The few times that the revetment would be subject to wave action would cause very little change in the energy level of the waves, since the revetment is located so far back on the backshore of the beach that most energy of the wave is lost due to uprush by the time it reaches the exposed face of the revetment.

As discussed in the findings above, however, waves periodically runup and strike the bluff an this beach during high tides and low sand periods. The placement of a revetment in the cul-de-sac design would most likely focus wave energy at the ends of the revetment towards the bluff face resulting in increased erosion at the base of the bluff. This increased erosion of the bluff could endanger the single family structures an top of the bluff. Some of these residences are sited quite close to the bluff edge. In order to prevent erosion of the bluff it may be necessary to then armor the open section of the beach and bluff between the two road extensions. In addition, this erosive situation would also take place at the eastern and western ends of the revetment. This could result in increased erosion of the road fill supporting eastern Sea Level Drive and the bluff face at the western end of the revetment. Again this situation could require additional armoring of these areas to protect existing development. Of course the road and revetment design which

stretches across the entire beach would be expected to guard against any erosion at the base of the bluff. However, increased erosion at either and of the revetment would be of concern.

In addition, although the applicant's geologic consultants have determined the bluff area to be grossly stable they did not address the surficial stability of the bluff. Neighboring residents report that sloughing of surface material and small debris flows occur frequently along the bluff. If a vertical seawall were constructed as part of the proposed action, it would require the drilling of approximately 250 caissons (based on 3 foot diameter caissons along 740 feet of wall). This activity could trigger extensive surficial failures during construction. If drilling is not possible for the entire wall, some blasting might be necessary which could trigger further surficial failures.

In addition to construction-related failures, this bluff can be expected to continue to erode as it has done historically, depositing material onto the proposed roadway below and possibly in the case of a large movement into the residential structures. The applicant's geologists, Geoplan Inc., in their report of November 9, 1990 state that, "Erosion of the bluff and sedimentation on the roadway are expectable. . ." However, they do not consider that mudslide type occurrences may be instantaneous during a storm without any warning for the public and these types of failures do not constitute a health and safety hazard.

In the winter of 1977-78, there were a series of intense rainstorms which triggered numerous mudslides and landslides. Within the City of Los Angeles alone, losses to public and private property were estimated to be $100 million (From "Southern California Landslides of 1978 and 1980" by James Slosson and James Krohn, in *Storms, Floods and Debris Flows in Southern California and Arizona 1971 and 1980*. Proceedings of a Symposium by the National Research Council).

> "Damage from debris flows and mudflows appears to be increasing in magnitude and is caused, in part, by the increased construction of homes at the base of natural slopes or partial natural slopes associated with older subdivisions. Most severely hit appear to be those sites or lots that were a part of pre-1963 or even pre-1952 subdivisions but were not built upon until recent years. . . . The potential for mudflow and debris flow hazard is easily recognized, but "few consultants will acknowledge evidence unless required by code." (from Slosson and Krohn, op. cit.)

While sloughing of the bluff In this cast could cause temporary road blockage, it does not appear to present a significant health and safety hazard any greater than that presented by other secondary roads in the area.

Questions arose during the analysis of these projects in the previous permit actions on these applications concerning the potential for liquefaction of the subject sites. The proposed development is located approximately one-half mile from the Malibu Coast Fault and must therefore be considered to be in an area with a high potential for ground motion. According to H. Bolton Seed and I. M. Idriss in *Ground Motions and Soil Liquefaction during Earthquakes* (a monograph published by the Earthquake Engineering Research Institute 1982).

> "In cases where the soil consists of loose granular materials, the tendency to compact may result in the development of excess hydrostatic pore water pressures of sufficient magnitude to cause liquefaction of the soil. . . ."

The applicants geotechnical consultants have prepared detailed analysis of the site's potential for liquefaction during ground motion. The applicant's geologist states:

> On the assumption that the Malibu Coast Fault would generate an event having a Richter magnitude of 6.5, it is highly unlikely that liquefaction would occur at subject property because of the uniform grain size of the beach

> sand, its very limited thickness (about 14 feet max.) and even less thickness of saturated zone (about 4 feet) and to the high strength of the underlying bedrock.
>
> However, liquefaction will not be permitted to affect the proposed dwellings which are to be supported on reinforced concrete plies founded 10 feet (minimum) into competent bedrock not subject to liquefaction. Moreover, the proposed rack seawalls intended to support the roadway will be founded In keyways excavated into the competent bedrock and thereby will not be affected by liquefaction, should it occur.

The applicant's soils engineer performed a detailed study and analysis of the site's attendant potential for liquefaction. Based on this study the consultant found that:

> It is concluded that the proposed development will be free from hazards of settlement, slippage and liquefaction provided the recommendations of the project consultants and applicable sections of the building codes are incorporated in the design and implementation in the field.

California Division of Mines and Geology is now preparing a field Evaluation Report and Preliminary Alquist Priolo Special Study Zone maps of the Malibu Coast Fault, and expects to release these in January 1993. The applicant's geologist has used studies from 1964 and 1973 to assess the significance of the Malibu Coast Fault to this proposed project. Much of the information prepared since 1973 suggests that this fault may be active and may be capable of generating a magnitude 7 earthquake. The reports from CDMG are not expected to alter the basic conclusions that the project can be designed to be safe from liquefaction during a major earthquake. However, if the maximum probable event is projected to exceed magnitude 6.5, the site should be designed for this higher event. Therefore, from the evidence presented it would appear that the proposed project could be engineered to insure the residences and roadway

would be safe from liquefaction during a major earthquake (magnitude 6.5), along the Malibu Coast Fault.

The Coastal Act requires that new development shall minimize risks to life and property in areas of high geologic, flood and fire hazards. (Section 30253.) In the Malibu/Santa Monica Mountains area fire is an inherent threat, brush fires in the past have burned from the mountains all the way to the beach. The bluff face at *this* site, or portions of it, also burned in the 1978 Malibu fire, according to documents filed in the private prescriptive rights lawsuit. The 1991 fire in Oakland was a grave reminder of the vulnerability of urban areas to massive wildland fires. Therefore, it is essential to ensure new development meets the current county fire code to minimize the risk from fire. The project as proposed does not meet the current county fire code. The code calls for private access roads to be 20 feet wide and to have a 32 foot curve radii for turn-around as measured from the centerline of the street. The code also requires "suitable" turnouts along the roads. The proposed cul-de-sac road design does not meet this standard of a 32 foot turning radius (turn around area) at the terminus of the two road extensions. In addition, the proposed road design across the entire beach would require suitable turnout areas every 1/4 mile along the roadway. It would appear from the project plans that it would be very difficult to provide turnouts on this proposed road design that would be acceptable to the fire department given the relatively narrow width of the road (20 feet). Furthermore, the western entrance of Sea Level Drive off of Broad Beach Road clearly does not meet the turning radius or width requirements of the fire code. Staff met with Fire Chiefs Jerry Pesket and Horst Zimmerman on the site and they indicated this entrance would require improvements to meet the fire code. The applicant at the time of the writing of this report has not submitted revised project plans for the improvement of this entrance.

In addition, in order to construct the proposed revetments numerous truck loads of rocks would have to be moved over the

very narrow residential streets of the subdivision. The applicant has not indicated how those rocks will be transported on the beach, what impact the truck traffic will have on the streets in the area, where temporary staging areas will be located, or any other temporary structures or facilities such as ramps to the beach, turn around areas, etc. It is evident that moving such a large amount of rock through a residential neighborhood with narrow winding streets will at a minimum create a significant nuisance for the neighboring residents. Such traffic too could damage existing road surfaces and lead to the need for a major road repairs or resurfacing. Without specific information regarding how the project will be constructed staff cannot adequately address the environmental impacts associated with such facilities and their consistency with Chapter Three policies of the Coastal Act. In addition, there may be potential safety or nuisance factors associated with the movement of this large amount of rock, such as vibrations from heavy equipment operating in close proximity to and in some cases crossing over septic systems located in the street, and traffic disruption through the area for many days and possible months which could interfere with emergency vehicles through the area. Without adequate information regarding how the proposed project will be constructed the Commission cannot at this time find the proposed project consistent with section 30253 of the Coastal Act.

Therefore, the Commission finds that based on the reasons cited above the proposed projects do not minimize risks to life and property and would create health and safety risks relating to fire hazards, inconsistent with Section 30253 of the Coastal Act and the relevant geology and hazard policies of the Malibu LUP.

E. Visual Resources

Section 30251 of the Coastal Act states that permitted development shall be sited and designed to protect the scenic and visual quality of coastal areas:

Section 30251:

> The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parts and Recreation and by local government shall be subordinate to the character of its setting.

In addition section 30253(2) of the Coastal Act states:

> New development shall:
>
> (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

The Malibu LUP contains the following policies regarding protection of visual resources which are applicable to the proposed development:

> P125 New development shall be sited and designed to protect public views from LCP-designated scenic highways to and along the shoreline and to scenic coastal areas, including public parklands. Where physically and economically feasible, development on sloped terrain should be set below road grade.

P129 Structures should be designed and located so as to create an attractive appearance and harmonious relationship with the surrounding environment.

P130 In highly scenic areas and along scenic highways, new development (including buildings, fences, paved areas, signs, and landscaping) shall:

be sited and designed to protect views to and along the ocean and to and along other scenic features, as defined and identified in the Malibu LCP.

minimize the alteration of natural landforms.

be landscaped to conceal raw-cut slopes.

P129 Structures should be designed and located so as to create an attractive appearance and harmonious relationship with the surrounding environment.

P134 Structures shall be sited to conform to the natural topography, as feasible. Massive grading and reconfiguration of the site shall be discouraged.

P135 Ensure that any alteration of the natural landscape from earthmoving activity blends with the existing terrain of the site and the surroundings.

As previously mentioned, the proposed developments include two design proposals:

Proposal 1: Construction of a 314 foot long extension of eastern Sea Level Drive and a 148 foot extension of western Sea level Drive both ending in a cul-de-sac, a 349 foot long rock revetment along the eastern extension of Sea Level Drive, a 188 foot long rock revetment along the western extension of Sea Level Drive, two 60 foot driveway extensions off the and of the cul-de-sac to lots 145 and 152, and three two story, 35

foot high, single family residences with septic systems. Total grading for the proposed project is approximately 10.674 cubic yards (10.674 cu. yds fill, 15 cu. yds cut) for the construction of the road.

Proposal 2: Construction of a 1,200 foot long extension of Sea Level Drive connecting eastern and western Sea Level Drive, a 985 foot long rack revetment and five two story, 35 foot high single family residences with septic systems. Total grading for the proposed project is 15,000 cubic yards.

This section of Lechuza Beach can be characterized as an undeveloped, pristine, scenic sandy and rocky beach backed by a 50-55 foot coastal bluff. Single family residences are located on top of the bluff and on the far eastern portion of the sandy beach. The proposed cul-de-sac design will create a large 6 - 20 foot high (approximate) wall of rubble (depending on sand level) that will protrude, approximately 75 feet from the bluff face and occupy 45,000 sq. ft. of sandy beach. The proposed road design extending across the beach is of similar design and will occupy approximately 80,000 sq. ft. of the beach. The proposed residences will extend an additional 25 feet (max.) from the revetments. In addition, the western end of the proposed road will have to be raised an additional 10± feet over and above the proposed revetment to meet the road grade of western Sea Level Drive. A caisson retaining wall of approximately 10± feet in height (an top of revetment) is proposed for the western portion of the road to meet the road grade of western Sea Level Drive. Clearly the two proposed projects located an undeveloped sandy beach are not compatible with the surrounding character of the area and will result in a significant adverse visual impact. Furthermore, the proposed rock revetment will substantially alter the natural beach and bluff landforms. Therefore, the Commission finds that the proposed developments are not

consistent with Section 30251 and 30253 of the Coastal Act and the visual resource policies of the Malibu Land Use Plan.

F. Environmentally Sensitive Habitat Areas

Section 30230 of the Coastal Act states:

> Marine Resources shall be maintained, enhanced, and where feasible restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long term commercial, recreational, scientific, and educational purposes.

Section 30231 of the Coastal Act states:

> The biological productivity of the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, minimizing alteration of natural streams.

Section 30240 of the Coastal Act states:

> (A) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.
>
> (B) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall

be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

The certified Malibu Land Use Plan (LUP) contains a number of policies to implement Section 30240 of the Coastal Act. Those relevant to the proposed development include:

P68 Environmentally sensitive habitat areas (ESHAs) shall be protected against significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas. Residential use shall not be considered a resource dependent use.

P69 Development in areas adjacent to environmentally sensitive habitat areas (ESHAs) shall be subject to the review of the Environmental Review Board, shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

P91 All new development shall be designed to minimize impacts and alterations of physical features, such as ravines and hillsides, and processes of the site (i.e. geological, soils, hydrological, water percolation and runoff) to the maximum extent feasible.

P98 Permitted land uses or development shall have no significant adverse impacts on sensitive and beach habitat areas.

P99 Development in area adjacent to sensitive marine and beach habitats shall be designed to prevent impacts that could significantly degrade the environmentally sensitive habitats. All uses shall be compatible with the maintenance of biological productivity of such areas.

P101 Only resource dependent uses shall be permitted in sensitive marine and beach habitats.

P102 In all sensitive marine and beach habitats, require that all permitted uses shall comply with U.S. Fish and Wildlife and Department of Fish and Game Regulations.

P120 Shoreline structures, including piers, groins, breakwaters, drainages, seawalls, and pipelines, shall be sited or routed or avoid sensitive rocky points and intertidal areas.

The above referenced policies clearly mandate that environmentally sensitive habitat areas and sensitive habitat areas and sensitive intertidal and nearshore subtidal areas shall be protected. The Malibu Land Use Plan designates the subject beach area, rocky point areas, bluff and offshore kelp beds as Environmentally Sensitive Habitat Area. In addition, Policy 108 of the Malibu Land Use Plan states:

P108 Beach Between Nicholas Canyon and Lechuza Point

This area should be retained as a marine area of biological and educational interest. Public use of El Sol, El Pescador, and La Piedra Beaches could impact the sensitive sea lion hauling grounds. Therefore, it is recommended that the state devise a program of public use that will not impact sensitive marine resources. Educational use of this portion of the coastline, with the exception of sealion haul-outs, is appropriate if numbers are controlled and beaches are posted as ecologically sensitive areas.

The proposed revetments, roads, driveway extensions, and residences would occupy a large area (45,000 sq-ft.± & 80,000 sq.ft.±) of undeveloped sandy beach. Section 30240 of the Coastal Act and the Malibu LUP clearly indicate that only resource dependent uses shall be permitted within ESHAs.

Obviously residential use cannot be considered a resource dependent use. Some questions have arisen as to whether the actual beach area is an environmentally sensitive habitat area. Obviously the beach and bluff habitat have been degraded somewhat by human activities. However, this beach is the southerly portion of one of the few relatively undisturbed stretches of coastline in Malibu, as well as in Southern California, with excellent on and offshore habitat. It is easy to understand why this area is designated in the Malibu LUP as environmentally sensitive habitat area. Even though human disturbances have somewhat degraded it, the Lechuza Beach shoreline habitat is deserving of protection not only for its value individually as habitat for various bird, insect, plant and animal species but also as part of a larger upcoast environmentally sensitive habitat area. Continued development on these few remaining sandy coves and rocky shorelines of Los Angeles County will forever degrade these very important environmentally sensitive habitat areas.

The applicant commissioned Fugro-McClelland Inc. to prepare a biological impact study to determine the impact to biological resources associated with the proposed development. The report concludes that:

> Impacts to onshore resources would not occur as a result of the project. Intertidal impacts to beach-dependent birds are considered less than significant. The project would have no direct effects below the mean high tide line and therefore, impacts to sensitive bird species using the surfline and near shore areas would not occur. Beach erosion or accretion of Lechuza Beach would not occur as a result of the construction of the rock revetment or seawall. Treatment of wastewater from each individual lot in a septic tank, leach field (or trench) and dilution by groundwater prior to discharge would prevent water quality impacts to intertidal, subtidal and nearshore habitats. Off shore areas are sufficiently removed that project-related impacts would not occur.

The applicant's consultant indicates that because the subtidal/ nearshore resources are sufficiently removed from the project site direct impacts would not occur. The consultant bases this finding on the engineering studies prepared by the consulting coastal engineers. However, the biological consultant concedes that indirect impacts could occur if project-related beach erosion/accretion occurred or water quality were degraded by the septic system effluent. As discussed in the previous section regarding the proposed protective device, evidence would seem to indicate that the proposed revetment is acted on by wave action more frequently than the applicant's consultants have projected. Therefore, there is a real potential for greater amounts of sand to be removed from this beach, particularly in the winter months, to an offshore bar and remain there longer. Giant kelp requires rocky substrate to survive. Increased sand deposition offshore could adversely impact the offshore kelp beds and its associated marine habitat. The City of Malibu's consulting biologist has reviewed the proposed project and indicates that:

> Kelp requires a rocky substrate. The increased off shore sand deposition created by this project may impact the kelp beds by exacerbating the already existing problem of offshore sediment deposits that are burying the rocky substrate habitat essential to kelp survival. Off Zuni Beach for example, new sediment deposits are between 3 - 4 feet deep, the existing bottom conditions off Lechuza Beach are unknown. The impact of an increased offshore sand load is a potential cumulative impact that should be addressed.
>
> Past experience provides a strong indication that this project will have significant biological impacts on the nearshore biological communities at Lechuza Beach. Specific changes in biotic composition have been documented following intensive shoreline development on the Malibu Coast. Latigo Cove was previously one of the richest sites along the coast in terms of the diversity and abundance of

kelp associated species. Following the development, which included an extensive rip rap system as well as a package sewage treatment plant, the kelp beds and associated biota were essentially eliminated with a 95% reduction in species diversity and a 98% loss in the standing biomass (R. Fay. Pars Comm.). While many physical variables clearly differ between the Latigo site and the proposed project site, the similarity is the change in the physical processes supporting the marine communities being altered far beyond their normal range of variation.

The City's biologist also indicates the project site contains suitable habitat for the Globose Dune Beatle, a category 2 candidate for Federal Listing as an endangered species. This species was recently identified in similar habitat at Topanga Beach. Therefore, there is some question as to whether the proposed project could threaten a potential endangered species. The applicant's biological study does not address insect species.

The Department of Fish and Game, previously submitted a letter (Exhibit 26) to the Commission concerning the potential impacts the proposed projects could have on the marine habitat. The letter indicates that the project, as proposed, could have significant adverse impacts on the nearshore and intertidal marine environment, including the very sensitive kelp beds offshore.

The Commission finds that the proposed beach is part of an environmentally sensitive coastline which provides habitat for numerous terrestrial and marine plant and plant species and that evidence suggests the proposed project could for the reasons sited above adversely impact this sensitive habitat area. Therefore, the Commission finds the proposed project is not consistent with Sections 30230, 30231 and 30240 of the Coastal Act and the resource protection policies of the Malibu LUP.

G. Sewage Disposal

Section 30231 of the Coastal Act states;

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

The certified Malibu/Santa Monica Mountains Land Use Plan contains the following policies regarding sewage disposal:

P218 The construction of individual septic tank systems shall be permitted only in full compliance with building and plumbing codes. Building and plumbing codes shall be revised to permit innovative and alternative methods of wastewater treatment and disposal, provided that installation, operation, and maintenance are acceptable to the Departments of Health Services and County Engineer-Facilities and to the Regional Water Quality Control Board. Such code revisions shall constitute an LCP amendment.

P225 The Departments of Health Services and County Engineer-Facilities shall continue to strictly enforce all Health, Building, and Plumbing Code requirements concerning private wastewater disposal systems. This shall apply to beachfront lots, as well as to other areas. Such requirements shall be considered to be part of the LCP.

P226 The County shall not issue a coastal permit for a development unless it can be determined that sewage disposal adequate to function without creating

> hazards to public health or coastal resources will be available for the life of the project beginning when occupancy commences.

The applicant has submitted preliminary design approval of the proposed septic systems from the County Department of Health Services which indicates that the proposed septic systems comply with health and plumbing codes. In addition, the County has indicated to staff that health inspectors were present when percolation tests were conducted to insure compliance with the county standards.

However, the City of Malibu has recently established through an interim ordinance (76U) that sewage shall be treated onsite:

> WASTE WATER DISPOSAL. All waste water shall be disposed of on the site where it is created or by a waste water treatment plant.

Both of the applicant's proposals involve offsite sewage disposal under the road right-of-way, which is a separate lot from the homesites.

Therefore, the proposed project is not consistent with the City of Malibu waste water treatment ordinance. The applicant has provided no evidence of variance from the City's ordinance.

Concerns have been previously raised about the effectiveness of the proposed septic systems; specifically, the effectiveness of leach fields in compacted road fill, the potential for the daylighting of effluent on the beach, effluent transport paths, and the cumulative impacts of possibly 16 septic systems in close proximity behind a revetment. The applicant commissioned three experts to address these questions: David Riggle, a consulting sanitarian; Kenneth Mullen, a consulting engineer; and Geoplan, consulting geologists.

The consultants indicate that the placement of leach fields in a compacted sand medium is an acceptable practice. The consulting sanitarian states:

> Historically, the only situation regarding the placement of leach lines/drain fields in compacted fill has been where natural sand exists an the building site. The Los Angeles County Departments of Health Services and Building and Safety have permitted the placement of clean sand on top of natural sand for the construction of leach lines. The sand naturally "compacts" itself, providing a stable condition for the leach line installation.

In regards to the cumulative impacts resulting from a total buildout of all 16 parcels behind the revetment, the consultants indicate that because of County Code setback requirements adequate spacing of the system will preclude any adverse cumulative impacts associated with systems. The consulting sanitarian states:

> The type of sewage disposal system design for the single family development including the required separation between systems, water table, bedrock and bulkhead wall all act to reduce any accumulative impact. Each system functions independently from the other system. The effluent filters down through the sand and moves along the bedrock/water contact toward the bulkhead.
>
> The proposed bulkhead design using rock with filter blanket will permit water to flow through, thus eliminating the build-up of water behind the wall. The sewage effluent will have filtered approximately 10 feet down and over 15 feet horizontally through sand before reaching the bulkhead, having lost its identity by filtration and dilution. A five foot separation between the leaching lines and ocean waters is recognized as being safe.

With regard to the potential for daylighting of effluent on the beach and the effluent pathways, the consultants agree that by the tine effluent reaches the toe of the revetment it will have been filtered and diluted to such a degree that it is unrecognizable as sewage. The applicant's consulting engineer states:

> The effluent path is as follows: sewage from the residence enters the two chambers septic tank where solids settle out in the first chamber. Overflow from this chamber enters the second chamber for final clarification. Anerobic bacteria reduce the solids to an inert ash. Relatively clear flow then proceeds to a distribution box where it is equally divided to each leaching line. The leaching lines are perforated pipe laid on a bed of gravel placed in a three feet wide trench. Effluent leaves the leaching lines through the perforations and enters the gravel filled trench. Water then percolates downward to either the water surface or rock surface. Upon contact along that surface thru the revetment into the ocean where it is diluted many hundreds of times.
>
> . . . the effluent commingles with any groundwater that exists on the surface of the bedrock. Prior to its commingling it has traveled through a minimum thickness of 10 feet of sand which acts as a slow sand filter and renders it unrecognizable as sewage.
>
> Historically cobbles have always been present on top of the bedrock in this area. Sand fills the voids between the cobbles. Effluent and groundwater always flow along the bedrock surface, therefore, the cobbles and sand will always keep the effluent from surfacing.

The recently completed Malibu Wastewater Management Study (1992) indicates that beach sands allow for fast percolation. This high percolation rate would normally constrain the use of beach sands. But, according to the study, a biological "mat" of algae and other organism grows among the sand grains. This biological mat is the primary "biotechnology" to reduce the concentration of pathogens in the drainfield sands. The biological mat slows down the infiltration of effluent and treats pathogens by filtration, retention and chemical renovation. Further reductions in concentrations of potential pathogens continue after percolation through the biological mat. The study

provides the following breakdown of treatment of septic tank effluent:

> Treatment or Septic Tank Effluent by Sands with a Biological Mat
>
> "Total Coliforms: 2-4 feet of well-drained sand with a biological mat will reduce bacterial concentrations to a level that meets most state and federal standards (loading rate-1.24 gpd per sq. ft.)
>
> "Fecal Coliforms: In sandy soil, 40 inches were required to remove fecal coliforms.
>
> "Viruses: Properly dosed and loded, 2 feet of medium sand have been very effective in removing viruses from treated drainfield effluent. The presence of a biological mat further improves detention, retention, and absorption of viruses. There are no studies that have found viruses in the effluent from a septic tank, despite deliberate dosing of the influent.

The City of Malibu's consulting Environmental Health Specialist, Larry Young, has submitted a letter to the Commission regarding the proposed system. Mr. Young indicates that if the proposed septic system is designed to conform to the Uniform Plumbing Code requirements there should be no adverse individual and cumulative impacts from the proposed septic system, the system as proposed appears to be in conformance with these standards. With regards to the placement of a septic system in compacted fill, Mr. Young states, "Sand is considered to be both self-compacting and, at the same time, the best soil category for percolation of effluent." Finally, Mr. Young indicates that with regard to potential for daylighting of effluent onto the beach, as long as the "Fifteen Feet to Daylight Rule" is enforced the daylighting of effluent should not be a problem. According to project plans the proposed septic system design conforms with the 15 foot to daylight rule.

Therefore, proposed septic system design appears to have an adequate filtration area (approximately 10 feet in depth) to adequately treat the septic effluent, will most likely not daylight on the beach, and if it did the effluent would be treated and diluted to such a point it would not be considered hazardous. Based on the evidence presented above it would appear that the septic system design as proposed is feasible and would function properly, as designed in this location. Therefore, the Commission finds that if the project were to be approved the proposed septic system could be considered consistent with Section 30231 of the Coastal Act and the applicable policies of the Malibu LUP.

However, the offsite design of the system is inconsistent with the City ordinance. Therefore approval of the proposed projects could prejudice the City's ability to prepare an LCP.

H. – Cumulative Impacts of Development

Section 30250(a) of the Coastal Act states:

> New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually of cumulatively on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of the surrounding parcels.

Section 30105.5 of the Coastal Act defines the term "cumulatively" as it is used in Section 30250(a), to mean that:

> the incremental effects of an individual project shall be reviewed in conjunction with the effects of past projects, the effects of other current projects, and effects of probable future projects.

The Coastal Act requires that new development be permitted only where services are adequate and only where public access and coastal resources will not be cumulatively affected by such development. The applicant is proposing two alternative development schemes. One consists of the construction of two extensions of Sea Level Drive ending in cul-de-sacs, with a revetment to protect the road and septic systems for eight single family residences. The other proposal is for the construction of Sea Level Drive across approximately 1,200 feet of beach connecting eastern and western Sea Level Drive, a revetment to protect the road and septic systems for six single family residences.

If one or the other proposed design scenarios were approved the remaining parcels on this beach could then be considered infill parcels and could eventually build out under the proposed road extension and revetment designs. A total of 16 parcels could eventually be built out if either design is approved. The previous sections of these findings have documented the potential significant adverse impacts the proposed development would have on beach profile and public land boundary, coastal access and recreation, environmentally sensitive habitat areas, visual resources, and hazards. The cumulative effects of building out the parcels on this beach would intensify the significant adverse environmental impacts outlined above.

The subject permit applications currently before the Commission could result in the development of over 1,600 feet of vacant sandy beach. The development of this large stretch of sandy open beach will establish a precedent for the entire California Coast. The approval of this proposed project would redefine infill development from the development of one or two beach front parcels between existing development to large stretches of

open sandy beach thousands of feet in length. This could result in development of long stretches of sandy open beach along the entire California coastline. Commission staff have identified two beach areas similar to the Lechuza Beach situation which could be directly and adversely impacted by the precedent this project would establish:

> The extension of Potbelly Beach Road to Los Olas Drive in Santa Cruz County
>
> The extension of Beach Drive in Rio Del Mar in Santa Cruz County

There are many more beaches up and down the California Coast that could be adversely impacted by the precedent this project would establish if approved. The previous sections of these findings contain extensive documentation of the adverse individual and cumulative impacts the proposed development would have on coastal resources and access, therefore, staff recommends the Commission find that the proposed project is not consistent with Section 30250(a) of the Coastal Act.

I. Local Coastal Program

Section 30604 of the Coastal Act states that:

> (a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

Section 30604(a) of the Coastal Act provides that the Commission shall issue a Coastal Permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with

Chapter 3 policies of the Coastal Act. On December 11, 1986, the Commission certified the Land Use Plan portion of the Malibu/Santa Monica Mountains Local Coastal Program. While the county prepared and certified LUP is no longer effective in the newly incorporated City of Malibu, the previously certified LUP continues to provide guidance as to the types of uses and resource protection needed in the Malibu area in order to comply with Coastal Act policy. The certified LUP contains policies to guide the types, locations, and intensity of future development in the Malibu/Santa Monica Mountains area. Among these policies are those specified in the preceding sections regarding shoreline development, hazards, public access, habitat protection, marine resources and productivity. As proposed, the development will create adverse impacts and will be inconsistent with the policies contained in the LUP. If it is assumed that at least some of these policies are incorporated into the City of Malibu's planning documents, then approval of the proposed projects would obviously prejudice the City's ability to prepare its LCP.

The City of Malibu is currently in the process of preparing a general plan and has not as yet addressed what plans the City has for this beach. The City has indicated to staff that although the City at this time has no specific plans for this beach they continue to use the Malibu LUP as guidance for development in the interim. As previously mentioned, LUP Policy 56-4 indicates that "public purchase of beach and accessway properties is an objective in this area". It is possible that the City will also designate this site as a possible acquisition site. The lots could also be part of a transfer-of-development-credit program. In addition, since these parcels were purchased as one unit the City may require lot consolidation or reconfiguration to mitigate the potential adverse impacts from developing the individual parcels or to meet City Building Code requirements. The City of Malibu has recently lifted the moratorium on single family residences and has enacted interim building ordinances to regulate development of single family residences. The

proposed projects are not consistent with some of these interim ordinances. For example, Malibu Municipal Code Ordinance 76U (14) states that:

> 14. WASTE WATER DISPOSAL. All waste water shall be disposed of on the site where it is created or by a waste water treatment plant.

The septic systems for the proposed structures are located off of the subject lots under the street which is designated as lot A on the subdivision tract map. Therefore, the effluent is not being treated on site which is contrary to Malibu's interim Building Code. In addition, the proposed residences exceed the City's residential square footage and building height requirements.

The Planning Director of the City of Malibu has recently submitted a letter which confirms the concern about prejudice to the preparation of LCP. The letter states in part:

> [T]hese projects represent an enormous undertaking by Malibu standards and is [sic] in contradiction to the City's moratorium on the processing of such multiple density development. As you are also well aware by now, the City of Malibu is currently in the process of preparing its general plan and local coastal program . . . . The City does not take any position on these projects and will review them on their merits when it [sic] comes properly before the City. However, reconsideration of the denial of these applications, especially for a project of this magnitude, may prejudice the City's ability to develop its own land use plan. (Exhibit 27.)

Therefore, for the reasons cited above, the Commission finds that approval of the proposed developments will prejudice the City of Malibu's ability to prepare a Local Coastal Program consistent with the policies of Chapter 3 of the Coastal Act. (Section 30604(a).)

J. California Environmental Quality Act.

Section 13096 (a) of the Commission's administrative regulations requires Commission approval of a coastal development permit application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5 (d)(2)(i) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lesson any significant adverse impact which the activity may have on the environment. The Malibu Land Use Plan provides that:

> P67 Any project or use which cannot mitigate significant adverse impacts as defined in the California Environmental Quality Act on sensitive environmental resources (as depicted an Figure 6) shall be denied.

Furthermore, Section 15042 of the CEQA Guidelines provides in relevant part that:

> A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.

Previous sections of these findings contain extensive documentation of the significant adverse impacts the proposed development would have on the environment of the Malibu portion of the California coastline. There are feasible alternatives to the proposed projects which would lesson the impact an the environment. There exists an offer to purchase the property to create an open space recreation area on the beach. In addition, the subject parcels would qualify as Transfer of Development Credit lots under the TDC Program. Therefore, for reasons previously cited in the findings above, the Commission finds that the proposed projects are not the least environmentally damaging

feasible alternative and cannot be found consistent with the requirements of the Coastal Act to conform with CEQA.

K. Constitutional Issues

Section 30010 of the Coastal Act states:

> The legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Under section 30010, the Commission is prohibited from construing the Coastal Act in such a way as to take property without the payment of just compensation. Thus, a project cannot be found inconsistent with the Coastal Act if such a finding would deprive the property of all economic use and the proposed project does not constitute a nuisance under California law.

To assert a claim of taking without just compensation based on a Commission action, an individual or entity must demonstrate as a threshold showing that but for that action, the economic use which is proposed could in fact have occurred. In other words, the applicant must show he has a property interest sufficient to allow for construction of the project. In this case, the applicant has not made such a showing.

As indicated earlier in these findings, there are both public and private claims on the property the applicant wishes to develop which conflict with the proposed project. There is substantial evidence that the mean high tide line is landward of the proposed development for a part of the year, and thus that the develop-

ment proposed is on tidelands subject to the public trust. The State Lands Commission has indicated that unless the applicant proves the State does not have title, the project would require a State Lands Commission permit which appears to be unobtainable because the use is inconsistent with the public trust governing such lands. Similarly, the Commission found that the project as proposed would interfere with and obstruct a public navigational easement adjacent to the State's sovereign lands and, thus, is impermissible. Language in the deed indicates there is a private easement across the properties of indeterminate width which provides that the easement, specified to be generally 25 feet wide, shall "in no event . . . be less than ten (10) feet inland from said ordinary high water mark." Finally, there is a private prescriptive claim to the area which is pending in Los Angeles County Superior Court.

Even if the applicant were to overcome these public and private claims, a taking claim requires demonstration that no economic use remains in the property after a permit denial. The applicant has not made such a showing. As indicated above, one of the reasons for the denial of this permit is the fact the City of Malibu is currently preparing its local coastal program, and approval of this project at this time would prejudice the preparation of that LCP. Indeed, the City of Malibu has a moratorium on the issuance of building permits for projects such as this and has also specifically requested the Commission to deny the project in order to avoid prejudice to the City's ability to prepare its local coastal program. As set forth in the findings above, the project is inconsistent with the City's septic ordinance and inconsistent with the County Fire Code. Likewise, the City's ultimate plan for the area might establish land use designations which constitute economic uses but which, nevertheless, are inconsistent with the applicant's proposed project. Such uses might include a lot consolidation or recombination to allow for compliance with septic and fire requirements or a transfer of development rights program. In addition, the LCP could provide

for public acquisition of the area as was called for in the County's previously certified LUP.

The law is clear that the denial of a permit pending completion of a general plan and zoning ordinance does not constitute an unconstitutional taking where the delay caused by such a denial is not unreasonable. In this case, there has been no unreasonable delay. The City was incorporated while this application was pending before the Commission. Thus, the moratorium on development was only recently instituted.

Furthermore, some of the adjacent property owners have currently offered applicant $2.1 million for the property and intend to use the property for access to and use of the beach for a combination of private and public recreational purposes. Thus, even with a permit denial, this property has value and a use.

Finally, to assert a claim for an unconstitutional taking, an applicant must demonstrate interference with reasonable investment backed expectations. No such showing has been made. The applicant acquired title to this property when the nature of land use regulation of the property was uncertain because of the impending incorporation of the City of Malibu, with a County LUP which called for acquisition as a park in place, and with knowledge that the Commission staff thought the proposed use to be inconsistent with the Coastal Act. The document originally submitted as proof of ownership to Commission staff was an "as is" purchase agreement with Encinal Properties, Inc., and title was eventually transferred by quitclaim deed from the Adamson Companies.[5] The private prescriptive

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[5] Information provided by the attorney for the private prescriptive rights claimants indicates that Encinal Properties, Inc, listed Mr. Norman R. Haynie as its Chief Executive Officer as of June 1, 1990. However, the deed lists Adamson Companies as the grantor with Lechuza Villas West as grantee. The text of a purchase agreement between the latter two parties (also provided by the attorney for the

(continued...)

rights claim to the beach area was already pending at that time. In short, applicant could have very little reasonable expectation that development would occur on this property.

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[5] (...continued)
private prescriptive rights plaintiffs) indicates that it was not only an "as is" sale, but that "the location of the mean high tide line will have a material effect on the existence, extent, configuration and development potential of Seller's Residential Lots." (p. 8)